

No. 12927

United States
Court of Appeals
for the Ninth Circuit.

RKO RADIO PICTURES, INC., a Corporation,
Appellant,

vs.

ANN SHERIDAN,

Appellee.

and

ANN SHERIDAN,

Appellant,

vs.

RKO RADIO PICTURES, INC., a Corporation,
Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 305 to 627)

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Southern District of California,
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Southern District of California,
Central Division.

Thursday, February 1, 1951—9:30 A.M.

(The following proceedings were had in the absence of the jury:)

The Court: Call the case.

The Clerk: No. 10585-C, Ann Sheridan v. RKO Radio Pictures, for further hearing on motion.

The Court: The record will show that this is out of the presence of the jury.

Mr. Rudin: Your Honor, I prepared an affidavit for the Chief Deputy United States Marshal. I just went up to see him, he read the affidavit and said the affidavit was correct, but he didn't feel that he should appear at a proceeding and file an affidavit unless the court directed him to do so.

He said if the court would call up there he would be glad to come down with Deputy Baugher, who was one of the deputies that tried to serve Mr. Hughes. I talked to him last night and talked to him this morning. That was just the position he took. He said he was an officer of the court and didn't see that he could file an affidavit unless the court said it was all right for him to do so.

Mr. Knupp: From my standpoint, if the court please, the facts set forth in these affidavits are entirely immaterial. I think before the court enters into any consideration of the question of whether or not he is going to instruct [285] the deputy to appear, we should endeavor to determine what the effects of the affidavits would be in the court's judgment.

The Court: All right. We will follow that pro-

cedure and determine whether it becomes necessary later to get the marshal down here, and either have him come down here and have him testify to the matters or have him sign an affidavit.

Mr. Knupp: That is my position.

Mr. Rudin: He took the position that the return on the subpoena was sufficient, and Mr. Henry has gone for that subpoena, which was filed.

The Court: What did you ascertain, Mr. Knupp, as to the whereabouts of Mr. Hughes?

Mr. Knupp: I know Mr. Hughes has been in Los Angeles, but because of his various engagements I can't say to the court that I know where Mr. Hughes is at this time. I can tell the court that I spent a great deal of time last night in an endeavor to arrange for the attendance of Mr. Hughes here, and that I will not know until late this afternoon whether those efforts are going to be successful. If it is possible for me to do anything within my power to produce Mr. Hughes here, he will be here the first thing tomorrow morning. I have done everything I can in that respect, if the court please.

I have some very definite ideas, if the court [286] please, with respect to this entire matter, however, that I would like to express to the court.

The Court: Have you anything else to present, Mr. Rudin, before we hear from Mr. Knupp?

Mr. Rudin: Your Honor, I think, has gone to the crux of the matter in his comment yesterday, when he pointed out that the rules were quite broad as to the rights under Rule 37(a), I believe it was,

concerning the failure of a person to appear for his deposition, even if that person was a non-resident of the jurisdiction.

I found about four decisions on that particular phase of the problem. The Ninth Circuit case I cited to your Honor, there is a Second Circuit case, and two decisions in 1 Fed. Rules Decis. I also would like to call your Honor's attention to the decision of the Second Circuit in *Arnstein v. Porter*, 154 Fed. 2d 464.

The Court: What does it hold?

Mr. Rudin: That case holds that although a deposition of an adverse party has been taken, the other party still has the right to call him as a witness, and points out that is a very important right.

The Court: Call him by a subpoena, I suppose.

Mr. Rudin: The case doesn't discuss it to that full extent. It just points out how important it is to give the party an opportunity to cross-examine. That is the only [287] reason.

The Court: I don't think that adds much to it. We all know that that is true.

Mr. Rudin: Other than that, I only say that besides the *Mammoth Oil* case by the Supreme Court, there are about seven or eight C.C.A. opinions and some District Court opinions as to the rule of law that a person's failure to appear as a witness raises a presumption that his testimony would be unfavorable, that it is a rule of law. Other than that I am unable to find any authority directly authorizing the court to order a party to appear in court, except that it might be inferred from the

court's general power as your Honor commented yesterday.

The Court: Mr. Knupp.

Mr. Knupp: I think it is very clear, if the court please, that these rules of Civil Procedure which govern proceedings in this court were designed to make it possible for the adverse party to secure any information that he might desire that was in the possession of one party. The rules provide, as the court is aware, first, for deposition, next for the serving of written interrogatories, requests for admissions as to certain facts, and are generally designed so that it is completely possible for one party to secure any information that is in the possession of the adverse party. In order that a party may have that right and that it may become [288] fully effective, these rules have provided some very severe penalties. I suppose in the councils of the United Nations, they would be referred to as sanctions. I refer to them simply as penalties for failure to comply with any provision of these rules with respect to appearing for a deposition or answering written interrogatories, or replying to a request for admissions as to facts.

The rules having specifically provided that these means shall all be available to the adverse party to discover all of the facts in the possession of his adversary, and having completely failed to make any provision with respect to inability to serve a subpoena, it seems to me that the rule-making party clearly had in view a provision such as would enable Mr. Gang in this instance to discover all of

the facts that were in our possession and to make such use of them as he desired. I think the court must clearly conclude that having provided with respect to these discovery proceedings that these penalties might be inflicted, and having significantly omitted any provision dealing with inability to serve a subpoena on a witness, it must have done so designedly, and I think the matter comes down to this, if the court please: that in such situation it becomes a matter of the effect of the failure of the adverse party to appear in the proceedings, and that, it seems to me, is a matter for the court to consider when it comes to the settlement of the instructions in this case, and that, I think, [289] insofar as I can see, is all that this situation results in. If one party has a witness that might presumptively have testimony which would be favorable to the party, and the party fails to appear, it may be the subject of some instruction by the court, whatever the court decides is proper under the circumstances, but I can't find anything, and counsel has cited nothing which would indicate that the court had any power to impose any penalties because of the failure of the witness to appear or the failure of the opposing party to serve him with a subpoena.

I come to the conclusion from a study of these provisions that the rule-making power having decided that the adverse party had been given full opportunity to ascertain all the facts—and in that connection, if the court please, it is rather significant that these rules provide that the taking of a deposition and notice requiring answers to inter-

rogatories, and the production of documents do not require any personal service upon the party at all, service in those respects may be made merely upon the attorney for the party, and then if the party fails to appear the court may still impose those penalties. So my position is, if the court please, from a study of those rules, that whatever the effect of the inability to serve a subpoena on Mr. Hughes in this case is, that it can only result in the court giving some instruction which may be unfavorable to the defendant in this case if the [290] court thinks that is the type of instruction that is justified, but I don't believe that there is anything in the rules or in any of the cases that would justify the court in taking any other action. And I do think if the situation which is here presented was within the contemplation of the rule-making power as the basis for further action by the court, that that matter would have been explicitly covered by the rules.

Your Honor knows, of course, that the question of the settlement of these rules, their formulation and their final approval by the Supreme Court, was made the basis of many years of discussion and argument by leading attorneys all over the country, and I suppose received considerable attention from the court before they were approved. But that is the situation as I see it, your Honor.

Mr. Rudin: I have nothing further to add, your Honor, that I haven't already said, except I would like to call your Honor's attention again to *Arnstein v. Porter*, which clearly points out that the

right to take depositions in the discovery process was not intended as a substitute for the right to cross-examine a party.

The Court: Isn't that what you just told me?

Mr. Rudin: That was all. I have nothing to add, but to emphasize Mr. Knupp's point that we have had full discovery process.

The Court: The clerk has presented the marshal's return [291] of non-service on the subpoena. It has been filed, Mr. Clerk, has it?

The Clerk: I just filed it, your Honor. Apparently it hadn't been filed.

The Court: The marshal says he received the subpoena on January 25th and returned it on January 30th.

Mr. Gang: That is not correct.

Mr. Rudin: That is not correct. We sent it down January 9th. There was a Deputy Marshal Baugher that worked on this for two or three weeks.

The Court: The subpoena is dated the 4th, January 4th.

You may have this withdrawn to get such amended return as you want, as you see fit, but I am not going to hold the matter up awaiting that. As far as your record is concerned, anything you want to do with that subpoena to get a proper return, you may do so, and withdraw the original from the file for the purpose of taking it back to the marshal and having him put on there what should properly be on there.

The matter now before the court consists, first, of a motion that the court order the defendant to

produce Howard Hughes as a witness; second, a notice or a request by the plaintiff requesting the defendant to produce Howard Hughes. I look upon that notice or request, although made orally, to have the same effect as a notice would have for the taking of a deposition, or any notice that would be given counsel in [292] the case.

I am going to grant the motion that the court order the defendant to produce Howard Hughes. That motion will be granted on the showing that has been made.

And even without the showing, it seems to me that a party, a plaintiff, should have the right to require a party defendant to be in court, or an executive officer of a defendant, for the trial of a case.

However, although I am granting that motion, I am very frank to say that I do not think there is very much I can do about it in the way of imposing penalties on that motion. Mr. Knupp has heretofore made, at pre-trial, a showing why he couldn't produce Mr. Hughes. He has also made a showing here this morning that he has done all that he as an attorney could reasonably do to get him here. I know Mr. Knupp's reputation and standing at the bar, and I give those showings full value. Accordingly, there will be no inclination by this court, I will say very frankly, to hold the defendant or anybody in contempt if Mr. Hughes does not show up.

Certainly I wouldn't feel inclined to hold Mr.

Hughes in contempt without some showing that he had some knowledge of the order of this court.

I am granting the motion, however, and directing the defendant to use all reasonable diligence to produce Howard Hughes as a witness. [293]

Now, as to the effect of the notice and request that Hughes be produced, as to whether that comes under the rules so as to allow the court to impose any of these penalties, I am not going to impose any of the penalties referred to in Rule 37 for two reasons. First of all, this matter of the appearance of Howard Hughes as a witness was not brought to the court's attention until the day before this trial started, at the last pre-trial conference of a series of pre-trial conferences.

Is that right, counsel?

Mr. Gang: That is correct, your Honor.

The Court: That is the first time the court knew that there was any problem about producing Hughes. Had the matter been brought up at a pre-trial conference seasonably, I have no doubt that what I would have done would have been to direct the defendant to have made Hughes available as a witness, and would have insisted that something like that be put in a pre-trial order, and would then have taken such proceedings as I saw fit if Hughes did not appear.

I think the request was made late, was not brought to the court's attention in time.

Secondly, although it is true that the taking of a deposition is no substitute for the appearance of a witness in court, it nevertheless is one fact that

has some bearing on this case. The rules, as Mr. Knupp points out, are for the [294] purpose of discovery. There was discovery; Hughes' deposition was taken. We therefore do not have as strong a situation as one where you had been attempting to serve a subpoena for a deposition, or get an interrogatory answered, or had been relying on the fact that without interrogatories or depositions you would have Hughes available as a witness for the trial of a case. The case, therefore, is not as strong as it might be under those circumstances.

Finally, although I am not going to impose any penalty under Rule 37, I am not so sure but what 37 is broad enough to permit the court, in a case that would properly appeal to a sense of justice, to impose those penalties in this kind of situation. It would be a drastic thing to do, but if the purpose of the rules is to require an adverse party to come in and give a deposition when you only give notice to his attorney, that is clear from the rules, and if notice is served on his attorney and he does not show up, the courts have dismissed law suits, and by the same token I take it a court could strike out an answer and render a judgment against a defendant who had answered. If the purpose of the rules is to bring a man in for a deposition for discovery, it seems to me it would be one of those situations where it is obvious that the discovery is only preliminary to the trial, and if the rules are broad enough to permit this matter prior to trial, it seems to me that the rules obviously intended that a [295] party would be produced or some executive of a

corporate defendant would be produced at the trial.

However, I think if that is the purpose of the rules it is a thing that should have been raised at pre-trial procedures. I think that the pre-trial procedure set up is broad enough to take care of those situations.

For instance, at a pre-trial supposing the plaintiff makes a request, "We want Howard Hughes produced as a witness in the trial of this action," and supposing the defendant gets technical and says, "Well, I don't find anything in the rules that requires me to produce my client or an official of my client," the court at the pre-trial still has obvious power to handle it. "Well, if you are going to be that way about it, Mr. Defendant, just serve a notice to take this man's deposition at a certain time and place, I will now fix a trial date and when he appears for the deposition slap a subpoena on him. If he doesn't appear at the deposition, I will strike the answer and grant a default judgment."

The court's hands are not tied if a request is seasonably made. But I think it would be a drastic step to take to grant that type of relief where the request is made the day before trial at the tail-end of pre-trial proceedings and where a showing has been made as it has by the defendants, and where had the request been made seasonably in pre-trial proceedings, counsel for the defendant would have had an opportunity to [296] have presented the dilemma that the defendant might find itself in to Mr. Hughes, in which event Mr. Hughes might have decided the better thing to do would be to appear for trial.

So much for what I am holding as I am. It seems to me, however, that in view of the fact that I am going to permit, if Mr. Hughes is not produced, some argument to the jury, and may give an instruction, it seems to me that the jury should be notified in some fashion of this proceeding. You can't just argue something to the jury without them knowing something about it. Here is what I have been thinking about. See what the two of you think about it. I think that either the court should summarize to the jury what has transpired, or we should have some of this in the presence of the jury. That is, Mr. Gang should make a request and a motion that Mr. Hughes be produced, that he is a material witness. In which event we could eliminate all argument as far as the law is concerned, whereupon Mr. Knupp may make such explanation to the jury as he wants to. For instance, the showings he has made as to how busy Mr. Hughes is, and how hard it is to try to locate him. It is up to you. And I would propose to advise the jury that I granted the motion to produce him, and that I directed the defendant to make a reasonably diligent effort to produce him. Then I think we would have something in the record where any [297] argument to the jury would make some sense.

I think the jury is entitled to know that there is a claim by the plaintiff that Hughes is material, and by the same token, I think the jury is entitled to have the explanation of the defendant, the explanation of the defendant or his counsel, as to why the witness is not produced.

If agreeable to you that could be done by just an attorney's statement, or if Mr. Gang insists—I don't think he would, but you might conceivably argue that the statements should be under oath as a witness testifying before a jury. I think a gentleman of your standing could take counsel's word for the showing.

Mr. Gang: May I be heard a moment?

The Court: Yes.

Mr. Gang: I have a little concern about this portion of the procedure, and I might state that I would not under the circumstances differ if I were in your position with the feeling about sanctions or penalties, as an officer of the court, and therefore my statements are not in disagreement with your ultimate decision in that capacity. However, I do want to state, in line with the discussion we are just having, that our problem here is not one in which we delayed unreasonably. Your Honor must remember that the marshal had this in his hands for three weeks, and he was talking to Mr. Hastings, who was going to arrange, if he could, for [298] it to be served. So those three weeks passed without us having an opportunity to do anything except wait for the marshal to complete his negotiations. Only after the marshal gave up—about the week before the trial date we were informed of the fact that he had given up. We then engaged detectives, and in addition to that tried to get counsel, in the usual informal manner, to agree to produce Mr. Hughes.

The Court: Yes, but at no time during the pre-

trial procedures did you say to me as the judge, "We want to have Mr. Hughes present as a witness, can we make some arrangement for that?"

Mr. Gang: If I may say so, I think it would have been unfair to counsel for the other side, as long as they at that time, up to a week before, had had no offer for them to do it, to give them an opportunity; and as you know, we were pretty busy with pre-trials then.

I want your Honor to know that if we have to tell the jury things like that, we are going to read the article in *Variety* showing that Mr. Hughes was here having a financial conference at RKO on Tuesday. If you are going to get into those collateral issues with the jury, I don't know whether it is going to be good or bad insofar as it concerns me. In Mr. Knupp's explanation he would say he has war work, and we would have to read the article in *Variety*.

The Court: Let me interrupt you a minute. What about [299] this as an alternative? By stipulation of the parties let me make a short statement to the jury to the effect that the plaintiff, Ann Sheridan, in this case has made a motion and made a request that Mr. Hughes be present as a witness and available at the trial of this action; that Mr. Knupp has made a showing that he has done everything within his power to secure the attendance of Mr. Hughes; that Mr. Hughes is a very busy man, has a number of corporations, some of which are in defense work, and Mr. Knupp doesn't know whether he can produce Mr. Hughes or not, but as

far as he can, as an attorney, he will try to produce him, but he makes no guarantee that he can. That is in substance Mr. Knupp's showing. Then merely drop the matter at that stage without anything further for the jury.

Mr. Gang: You might prejudice plaintiff, because you drop in the "defense work" item and you omit the item that he was here Tuesday on RKO financial business.

The Court: What difference does it make where he is? As I read this case you cited, *Collins v. Wayland*, he was a resident of Oregon who went down and sued in Arizona.

Mr. Gang: What concerns me is leaving the jury with the idea that he is not here, because he is so busy on defense work, when the record shows he was here Tuesday on picture business. That is the only concern I have, your Honor. I don't want to influence the jury one way or the [300] other, but I don't want any nuggets about defense work dropped and omitting the other item that he was here on Tuesday about the picture business. I don't like the idea of throwing in the idea about defense work. While he is doing that, he is also doing picture work.

The Court: You are either going to have to let the defendant make a showing by a statement to the jury, let him put on evidence before the jury, or you are going to have to let the court repeat what his showing is, because the whole theory of this business that you can comment to a jury or instruct a jury about the non-production of a wit-

ness rests upon the theory that the defendant could produce this witness, that it is within their power to produce him. Now, *prima facie*, it is within their power, because he is an officer. That is your showing, that is all you have to make. Now, you certainly can't cut the defendant off from his opportunity to make a showing that it is not within his power to produce him.

Mr. Knupp has probably said everything that a good lawyer can say in that respect.

Mr. Gang: What about us, your Honor, with the showing we can make that he was here Tuesday on picture business?

The point I want to make is I don't want to stop him or the jury from knowing what efforts he has made, and I agree with you that Mr. Knupp has done everything he possibly [301] can do as an officer of the court, but I don't want a statement to the jury which leaves them with the impression that Mr. Hughes is engaged only in patriotic war work, when the fact is he was here Tuesday doing picture business in Hollywood at the Beverly Hills Hotel. I don't want the jury not to know that if it knows the other. I have no objection if it knows both.

The Court: Maybe Mr. Knupp will come up with some idea that will solve this.

Mr. Knupp: I would suggest, if the court please, at this point, as I assume that the court probably wouldn't want to make any statement to the jury until it came time to instruct the jury with respect to the general law in the case, that we wait to

determine whether Mr. Hughes is going to be here or not.

The Court: That is true. I think we can well wait. You said tomorrow morning?

Mr. Knupp: We will know tonight whether it is going to be possible.

The Court: I don't see any sense in doing anything until after tomorrow morning. But if he doesn't arrive tomorrow by the morning session, then what is your suggestion as to what the court do?

Mr. Knupp: Then I think the court should make some statement such as has been suggested by the court. I don't [302] think the situation with respect to Mr. Hughes is any different than it is with respect to the business manager of the plaintiff in this case, as far as we are concerned.

Mr. Gang: You can have him. He is available on telephone call.

Mr. Knupp: That is not my proposition. The question is you have the man who is the business manager of the plaintiff, and he isn't produced here. We have as much right to comment on that as you have on the fact that Mr. Hughes——

Mr. Gang: I will argue that at the proper time.

The Court: There is a difference, in view of Mr. Gang's statement that he would have him available if you want him.

Mr. Gang: He is available.

Mr. Knupp: We don't have to call an adverse witness, if the court please, just because he is available. We don't foreclose our right to comment on

the fact that he is not here simply because we don't put him on the stand. While I appreciate the court is going to say to the jury, "This man is an adverse witness and the defendant is not bound by his testimony," certainly there is no rule of law that requires us to call an adverse witness and put him on the stand so the jury may hear what he has to say.

Mr. Gang: This is no time for that argument. This is not a subject of discussion.

Mr. Knupp: We are off on another point. [303]

The Court: Mr. Knupp, I was reading *Corpus Juris Secundum*, that great volume of confusion, this morning and in the very last portion, I think, of Section 156 under the title "Evidence," there is on page 853, subsection c, "Failure to call or examine witnesses," and apparently the rule may not apply to corroborating witnesses.

Hickox would be a corroborating witness of the plaintiff. There is some definite question as to whether you can comment on the failure to call a corroborating witness.

Mr. Knupp: Of course, if the court please, from our standpoint Mr. Hughes could only be a corroborating witness in this case. I don't know. Your Honor suggested yesterday that there may have been a lot of things that Mr. Hughes knew that wouldn't be testified to by Mr. Rogell or Mr. Sparks; I think there are a lot of things that this witness may testify to, if he were called, that was not testified to by Miss Sheridan. I don't think there is any difference in the situation, frankly, your Honor.

The Court: Mr. Knupp, your contention that he would only be a corroborating witness would be correct, except for one point, and that is that he is an officer, an executive of the defendant, which in substance makes him almost a party. A corporation can only act through its officers, and he therefore is taken out of the class of an ordinary witness. He is a party to this litigation, he is an officer [304] of a party. He is a party in the sense that he is one of the people through whom the defendant operates. I think that changes the picture entirely. If he were only a witness, not in the employ of the defendant, then obviously he would be available to either party. It is the fact that he is in your employ, the fact that he is subject to the orders of the defendant, the fact that he is an executive of the defendant, that makes the difference.

Mr. Knupp: I suggest to your Honor that Mr. Hickox is in the employ of Miss Sheridan, is receiving a monthly salary from her for services which he is rendering for her. Your Honor's ruling is final with me.

The Court: And he shall be available. If there is any doubt in your mind, I will direct Mr. Gang right now to have him here at any time you want him.

Mr. Gang: I have offered to produce him.

Mr. Knupp: I am not going to call and examine, if the court please, anyone who is in the employ of Miss Sheridan, just because Mr. Gang offers me the opportunity. I have no doubt that he would be delighted if I do it. But I don't intend to do that,

and I don't think the law obligates me to do it.

And the question whether I get any instruction from the court in that respect, or whether I am allowed to comment on it to the jury, of course, is a matter that your Honor will [305] decide.

The Court: The matter we have talked about, we might as well decide it. As I see your point, you contend Hickox would be a corroborating witness for Miss Sheridan since he was present at some of these meetings?

Mr. Knupp: I contend more than that, if the court please. I contend, apparently something developed yesterday to indicate that there were some statements or declarations made by Mr. Hickox to which Miss Sheridan says she wasn't a party. I contend his testimony goes further than that. We certainly shall urge that as her business manager, his declarations or statements, even made without her presence, are admissible.

It brings up a point of law, of course, that hasn't been discussed so far in this case.

The Court: You were only stopped on the scope of cross-examination. You still had the alternative to bring Hickox in as your own witness, or you had the alternative of making the witness Banks, I believe it is, your witness.

Mr. Knupp: That's right.

The Court: But you didn't avail yourself of that.

Mr. Knupp: Yes, I think I said to your Honor that I expected to make Mr. Banks my witness. I expect to put him on the stand.

The Court: You mean later on?

Mr. Knupp: Yes. [306]

The Court: All right. I didn't understand you.

The point is when you were stopped on cross-examination you had the alternative of making him your witness, and I recall now that you elected not to make him your witness on that occasion, but you said you were going to call him later.

Mr. Knupp: That is correct, if the court please.

The Court: We might as well call the jury down.

Mr. Knupp: Before the jury is called, we would like to make a motion in this connection, if we may. At this time, if the court please, the plaintiff in the case having rested, the defendant now moves that the court instruct a verdict on the complaint in favor of the defendant and against the plaintiff upon the ground that there is no sufficient evidence to sustain the allegations of the complaint in two respects: In the first place, it appears clear from the record that the plaintiff had never up to the time that the contract was terminated approved any actor to portray the leading male role in "Carriage Entrance," and under the contract itself it was provided that if she did not approve an actor for that role she was not entitled to receive any compensation. Secondly, that it appears she was repeatedly offered an opportunity to approve an actor for the male role and she refused her approval in each instance. And, in the third place, the evidence on the part of the plaintiff so far offered does not in any way [307] indicate that the persons who were designated as the persons to take the lead in this

picture were not actors who were competent and qualified for the part. For all of these reasons we suggest to the court that at this point there is no evidence which would sustain a verdict in favor of the plaintiff in this case.

The Court: I am going to deny the motion.

I don't think it needs any comment except that on this kind of a motion you must take the evidence most favorable to the plaintiff's position. The evidence looked at most favorably, on your first point, would be that she did originally approve Robert Young at a time when there was at least a thought on the part of the defendant that Young would be available. Furthermore, as far as your other points are concerned, there is no evidence that the defendant ever actually designated a substitute in the technical sense of the word in place of Young.

Don't let that perturb you too much. I think on this kind of a motion I may look at that particular point. However, as far as the case is concerned, my present intention is to instruct the jury that it doesn't make a lot of difference whether there was a physical designation or not, that under this contract the parties had to eventually agree, however you want to phrase it, on who this male actor should be, because of the right given to the studio to suggest a name [308] and the right given to Miss Sheridan to reject it. But looked at from the standpoint of your motion, there has never been any actual designation by the defendant of anybody to take Young's part.

The motion will be denied.

Mr. Gang: May we have a moment's recess before we go ahead?

The Court: Very well. A short recess.

(A recess was taken.)

(The following proceedings were had in the presence of the jury:)

The Court: The record will show that the jury is present and in their proper places in the box.

Mr. Gang: So stipulated.

Mr. Knupp: So stipulated. May we proceed?

The Court: You may proceed.

Mr. Knupp: Mr. Sparks.

ROBERT SPARKS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Robert Sparks. [309]

Direct Examination

By Mr. Knupp:

Q. Where do you reside, Mr. Sparks?

A. In Van Nuys.

Q. What is your business or occupation?

A. I am a producer with RKO Pictures.

Q. That is the defendant in this action?

A. Yes, sir.

Q. What experience have you had in connection

(Testimony of Robert Sparks.)

with the production of motion pictures? Will you tell us generally?

A. I have been in Hollywood and actively in the motion picture industry since 1932, with the exception of 26 months while I was in the Marine Corps.

Q. I think your voice is a little bit too low, Mr. Sparks. Maybe it is the acoustics, but it is rather difficult to hear, and I imagine the jury may have the same trouble.

A. I will speak louder.

Q. During that period of time in what sort of work in connection with motion pictures have you engaged?

A. I have been a story editor, I have been on story boards, I have been executive producer, and a producer.

Q. For what companies have you worked?

A. For Paramount, for Samuel Goldwyn, for Fox, Universal, and for RKO. [310]

Q. And you have been continuously employed, I think you said, since about 1932?

A. '32, yes, sir.

Q. How long have you been employed by the defendant RKO Radio Pictures, Inc.?

A. Since 1945.

Q. And how long have you been employed in the present position which you occupy?

A. The same period.

Q. Will you state to the jury generally, Mr. Sparks, what your duties as a producer at RKO consist of, what do you do?

A. The producer selects the story, chooses the

(Testimony of Robert Sparks.)

writer, supervises the preparation of the script, selects the cast——

Q. I don't know that the jury knows just what you refer to by the script. Will you explain the process by which the literary medium which is translated to the screen is prepared?

A. We take a story, as in the instance of "Carriage Entrance," which was a novel—this is sometimes a novel, sometimes it is only an idea, sometimes it is a short story either published or unpublished, and we try to organize and regiment that into some screen play form.

Q. And the screen play contains the direction as to the action as well as to the thread of the [311] story?

A. Yes, sir.

Q. I think I interrupted you when you were discussing the nature of the duties that you performed as a producer.

A. No, I think I had completed with the possible exception of that which happens after the picture has been produced, which is concerned with the cutting, the dubbing, the scoring, meaning the music, and the preparation of the picture for its release print.

Q. With respect to the selection of a cast of actors to perform in the picture, do you perform any function in that respect?

A.. Yes.

Q. What do you do in that respect, Mr. Sparks?

A. Well, through our own knowledge of actors, I am speaking of producers generally, through our own knowledge of actors we assign various people

(Testimony of Robert Sparks.)

who are in the business of acting in pictures, we make out a cast list for the various characters in the picture, in the screen play, we have perhaps as a producer our own ideas about who should play this; the casting department also has their own ideas, and you get a list from them; you get suggestions from agents who may know something about the story property or the scripts, and you also, from the various other executive heads in the studio, get suggestions. These are all compiled. We get it down to possibly two, three, four, five [312] names, and then from the standpoint of policy within the studio normally this would go to the head of the sales department; in the instance of RKO it is Mr. Depinet, who is also president of RKO, and Mr. Depinet would make his analysis as to how this cast might appeal from the standpoint of being able to sell it to exhibitors. Based upon his opinions, the opinions of the heads of the studio, the opinions of the producer, we finally assemble a cast and begin shooting.

Q. The ultimate purpose being, I assume, to have a picture produced which will have a box office value commensurate with its cost to the studio?

A. That is the great problem, Mr. Knupp.

Q. In regard to "Carriage Entrance," Mr. Sparks, when were you first brought into the situation with respect to production of that picture?

A. Well, it was the latter part of April, 1949, I guess.

(Testimony of Robert Sparks.)

Q. And how were you brought into the production?

A. Well, one afternoon I got a call from Mr. Rogell to come to his office, and in Mr. Rogell's office I found then the members of the board that were acting in the executive capacity within the studio.

Q. I think I ought to say to you, Mr. Sparks, that here you will not be permitted to testify to any conversations [313] that you may have had with anybody except the plaintiff or her representative, so that any of your discussions with these officers of RKO will not be permitted, you will have to bear that in mind to testify.

A. Then how may I answer your question?

Q. You can testify generally what you were assigned to do, I think, without any objection.

The Court: What you did.

The Witness: The result of this was that I was informed that the studio had accepted a package from Polan Banks Productions; it consisted of a script based on a novel called "Carriage Entrance," it consisted of Ann Sheridan as leading lady, Robert Young as the leading man, and there was a contractual obligation that made it necessary that Mr. Banks appear on the picture as producer. And because of my long association with RKO there was a feeling that Mr. Banks needed someone to act as a liaison and to sort of keep him out of trouble, which is very easy for a new producer to get into in a studio that he does not know——

(Testimony of Robert Sparks.)

Q. (By Mr. Knupp): Do you mean to say that experienced producers never get into any trouble?

A. They get into plenty. But inexperienced ones can get into even more.

Q. At the time, then, that you were brought into the picture, it appeared as though——. Withdraw that. [314]

At the time that you were brought into the situation it appeared as though the picture was ready to be made? A. That was true.

Q. What was your first duty in connection with the production of the picture, Mr. Sparks?

A. My first duty was to read the script. I found that it was not a complete screen play. It was possibly two-thirds of a screen play.

Q. Can you tell us, Mr. Sparks, at this point—the jury might be interested—in a brief narrative what the story was that you were going to make the picture from? A. Well, this story was——

Q. I imagine the jury enjoys a story.

A. I don't want to do anything here that may keep them out of the theatre, either.

This was a story of a Creole girl in New Orleans. This girl's grandmother had been a prostitute. The situation with her immediate family, which consisted of her aunt and her cousin—they were on the fringe of being wealthy, their hope was that this girl would marry a wealthy man who was one of the characters in the story. The girl, however, is in love with a professor at the university, and the progression is that of the struggle of the girl

(Testimony of Robert Sparks.)

between the factors that tried to keep throwing her background between her and her romance, and how this resolves itself in the [315] final unity of the professor and the girl.

That, very badly, is the story.

Q. And the girl in the story was the part which was to be assigned to Miss Sheridan?

A. That's true.

Q. And the professor in the story was Mark Lucas, the part which was originally intended for Robert Young?

A. Yes. The part was then called Quentin, I believe.

Q. But later his name was changed to Mark Lucas? A. Yes, Mark Lucas.

Q. And the cousin of the girl was the part assigned to Melvyn Douglas? A. That is true.

Q. I interrupted you when you were stating what you first did in connection with this production.

A. Well, there was no completed screen play on this.

Q. What was the situation in that respect?

A. Leopold Atlas had apparently been engaged by Mr. Banks to write a screen play, and somewhere along in the writing of it he had run out of dialogue, and the latter third of the script was told in narrative form, and there were certain factors in the narrative form which were not admissible to the production code, having to do with the standard of morals, which we must have in pictures, so that the

(Testimony of Robert Sparks.)

script itself was a considerable problem at the beginning. [316]

When I told Mr. Banks this, he then gave me a script which was completed, but which the latter part of it had been finished by himself, and Mr. Banks, not being a screen play writer, it didn't improve the quality of it any. So the first task was to try to get this screen play into some sort of form so it might be shot and made into a picture, and to that point we engaged a writer, Marion Parsonnet. Mr. Parsonnet was approved by Mr. Rogell, who was the executive producer of the studio, and by Mr. Banks.

Q. I think Mr. Banks testified that he worked with Mr. Parsonnet in the revision of this script, is that true?

A. Yes, they went away for three weeks to write on this script.

Q. Do you recall, starting with April 29th, about when it was that their efforts were finished and the script was in final form or budget form, at least?

A. Well, they came back in about three weeks. In the meantime Robert Stevenson had been assigned as director, as I recall it, and they presented—Mr. Banks having the prerogatives of a producer, they presented a script to Mr. Stevenson and myself, and we both found a number of faults with it, and then Mr. Stevenson, myself and Mr. Banks worked with Mr. Parsonnet, and I think we had a first—what we call a first draft of our draft, not actually the first draft, because in draft numbers

(Testimony of Robert Sparks.)

this would have been the third draft, [317] but actually for studio purposes and within the studio this became the first draft of "Carriage Entrance," and I think that was out of the mimeographing department around the 7th of July.

Q. What was your particular problem in connection with the script, Mr. Sparks, if there was a particular problem, with relation to the characters that you were trying to develop?

A. Well, there was quite a problem with respect to the professor, because from a literary sense there was an inference in the script, in the novel, that there was a rather esthete quality to this professor; this professor was to be the leading man, and from the standpoint of what we term sex in pictures we had to do a great deal to try to make that character a little more virile than he was in the original version. There was also the question of certain censorship problems with respect to the picture, because this touched on a subject that is not too often put on the screen, and there had to be a certain amount of taste used in trying to present this in such a way that it would not be in any way offensive.

Q. When the script was revised, what in your judgment was the result of the revision as far as the character of Mark Lucas, the professor, was concerned?

A. Well, I think he came out a very strong and very [318] attractive character.

Q. So that the revision of the script resulted in that being a more desirable part to play in the pic-

(Testimony of Robert Sparks.)

ture? A. To my way of thinking, yes.

Q. When did you first meet the plaintiff, Miss Sheridan, in connection with this picture?

A. Miss Sheridan, I think, came to the studio around the 5th, I believe it was the 5th; it was after the 4th, I think the day after the 4th of July.

Q. Were you there at the luncheon which was given for Miss Sheridan, which she mentioned as being a welcoming sort of affair?

A. Yes; Miss Sheridan and Mr. Hickox, whom Miss Sheridan introduced to me as her business manager, and Mr. Banks, came to my office before we went to lunch, and we went to the lunch.

Q. You knew Miss Sheridan before this, did you?

A. Yes, I have known Miss Sheridan since she came from Dallas many years ago.

Q. Did you know Mr. Andrew Hickox before this? A. No, I had never met him before.

Q. Who introduced him to you?

A. I believe Miss Sheridan did.

Q. What did she say that he was, if anything, at the time she introduced him? [319]

A. Her business manager.

Q. Did you have any conversation with Miss Sheridan on the occasion of this first visit with respect to the leading man role in the picture?

A. Mr. Knopp, I don't believe so. I think it is normally a practice that when a player who has not been on a lot—that doesn't apply alone to RKO, but there is always a little interlude of social mat-

(Testimony of Robert Sparks.)

ters before we get down to sparring about the questions of cast and other things, and the occasion of this luncheon was merely to welcome Miss Sheridan on the lot. I think we talked only in generalities, and there was nothing specific, because it appeared from the status of the package that it was practically ready to begin production, and was not concerned with any problems.

Q. Did you attend some meeting at which Miss Sheridan was present, at which the question of the designation of certain people as a hairdresser, or wardrobe woman, or make-up woman was discussed?

A. Yes, that could have been at this luncheon; those are purely routine matters, because a star of Miss Sheridan's dimension generally has those persons in the hairdressing, makeup, and wardrobe department that they like, and they go with them from picture to picture, and Miss Sheridan gave us the names of those persons and I told her they would be engaged by the studio, and they subsequently were. [320]

Q. As I understand it, Mr. Travilla was designated by Miss Sheridan as the designer of her costumes in this picture?

A. He was, yes.

Q. Mr. Travilla was the choice of Miss Sheridan, was he?

A. Yes, we borrowed him from 20th Century-Fox for the picture.

Q. You had to get him from outside in order to comply with her request that he should be employed, is that true?

A. That is true.

(Testimony of Robert Sparks.)

Q. When did you ascertain, Mr. Sparks, that Mr. Young had refused to approve this part in the picture?

A. I think Mr. Banks advised me of this somewhere around the 9th or 10th of July.

Q. I can tell you, Mr. Sparks, from the record that the script was submitted to Mr. Young's agent on July 7th, and the refusal in writing from Mr. Young was received by the studio on July 12th. Does that indicate to you when, possibly, you first heard this?

A. Yes, it does. Mr. Banks had the same agent that Mr. Young had, being Nat Goldstone, and Polan brought me word from the Nat Goldstone office that Young had turned down or intended to turn down the part, before any official letter came to the studio. [321]

Q. But it was after the script had been sent to Goldstone's office?

A. A very short time after, yes.

Q. So it must have been between the 7th and 12th of July? A. That's right.

Q. When you learned of this situation did you make any attempt to persuade Mr. Young to change his mind?

A. Well, I made an attempt to get hold of Mr. Young, because I could not understand if he had approved the original, which was an incomplete script, in which the character was not at all an attractive character, I couldn't understand what his reasons were for turning down this script, which in all of our estimations was a much better script,

(Testimony of Robert Sparks.)

and I was unable to get hold of Mr. Young because he had some time around the 4th of July gone up north, I think, to Carmel or some place, and I couldn't reach him, or apparently his agent couldn't reach him in a way that I might sit down and talk with him, because it was rather unusual for a star of Mr. Young's position to turn down a part and not allow the producer some rebuttal, or not allow the producer or those concerned with the production of the picture to ascertain exactly what his objections were, and if they were at all amenable to any kind of fixing, to allow us an opportunity to fix or to change or to alter the script. [322] But at no time was I able to get hold of Mr. Young, and in fact his agent finally told me that he had just completed a picture at Columbia, that he was now engaged in getting together a radio program, which is on the air now, called "Father Knows Best," and that his feeling was that there was no need of talking to Mr. Young, because he apparently—in fact, I never could find any evidence that Mr. Young had actually agreed, at least I could find nothing in writing that he ever had agreed to do this part.

Q. With respect to approval of the original script or the story itself, you mean? A. No.

Q. As a result of whatever efforts you made, Mr. Young eventually did absolutely refuse to perform the role?

A. I presume he did. Since this was a package deal, and since both Miss Sheridan and Mr. Banks

(Testimony of Robert Sparks.)

stood in the way of participating in the profits of the picture, I even appeal to them that they make some effort to try to find out what had happened to their man, and why he had changed his mind; and apparently they were not successful in contacting him.

Q. Did you discuss that question with Miss Sheridan? A. I did.

Q. When did you discuss it with her?

A. I think it was probably somewhere around the 11th. [323]

Q. Probably the first meeting you had with Miss Sheridan after you learned that Mr. Young would not perform the role?

A. I am not quite clear about that, Mr. Knupp.

Q. I don't expect you to remember the date, but relatively?

A. It seems that would follow, yes.

Q. Will you tell us what was said in that discussion between you and Miss Sheridan about this matter?

A. Well, Mr. Hickox was also present, and I don't know what was said, apparently nothing constructive, because nothing occurred to change the situation.

Q. When did you start your efforts, then, to secure somebody to take Mr. Young's place?

A. I think this must have happened sometime after the official notice had been received by the studio that Mr. Young would not play the part; in fact, I think that Polan began to assemble names

(Testimony of Robert Sparks.)

even prior to that time, because he had been in contact with Goldstone, and I presume that he felt that this was impossible insofar as Mr. Young was concerned, so we began then making out a list of possible people to play this part.

Q. And this, you think, must have been shortly after July 12th? A. Yes, I think so. [324]

Q. Had you determined at that time, Mr. Sparks, about how long it would take to produce this picture?

A. Do you mean in shooting schedule?

Q. Yes, in shooting schedule.

A. No, I don't think so at this time.

Q. Will you tell us, if you had conversations with Miss Sheridan about this matter of a substitute for Mr. Young, will you tell us approximately when the first of these meetings occurred?

A. Well, it was somewhere around the 12th, I would say.

Q. Where did it occur? A. My office.

Q. Who was present?

A. Mr. Banks, Mr. Stevenson, Miss Sheridan, and Mr. Hickox.

Q. Will you tell us what was said by the various parties present at that conference?

A. Well, I can answer that only in general, Mr. Knupp. We have in the motion picture industry a booklet that is put out by the motion picture industry which contains the pictures and either agency or phone number where you can reach the players,

(Testimony of Robert Sparks.)

and we began an exhaustive search through this to try to find a leading man.

Q. Do you recall whether the names of Mr. Ryan or Mr. [325] Ferrer were discussed at that meeting?

A. Well, we have under contract at RKO both Mr. Ryan and Mr. Ferrer, and I think from the very beginning that it had been indicated to me by Mr. Rogell, when it became common knowledge that Mr. Young was not going to do this part, that either or both of these two players, Mr. Ryan or Mr. Ferrer, would be available for the picture.

Q. What in your judgment was the suitability of either or both of these two men for this role?

A. Well, I think of the two Mr. Ryan is by far the best, although Mr. Ferrer is a fine actor, and probably could have given a very excellent performance of it. Of the two men, my preference was always Robert Ryan.

Q. What did you think about Mr. Ryan in the part of this role?

A. I thought he would be fine.

Q. Did you feel that he would have, in combination with Miss Sheridan, made a successful picture?

A. I am certain they would have.

Q. Did you discuss these matters with Miss Sheridan at this first meeting, about Ryan and Ferrer?

A. At that time I was making another picture, "Bed of Roses," with Joan Fontaine, and I had both Mr. Ferrer and Mr. Ryan in that picture, and

(Testimony of Robert Sparks.)

I believe that it was right around this time that one day in the dailies there was a short scene, [326] a couple of hundred feet in which both of these actors appeared, and I believe at this first meeting or at one of our early meetings with respect to the cast, I took Miss Sheridan, Mr. Hickox and Mr. Banks and we went to the projection room and I ran this, what we call a rough daily scene. This is a scene just as it is shot on the set and before it has been cut, or before there have been close-ups and the other things that we do before we edit a picture. And I showed both of them these takes. There were probably two or three takes of the same scene.

Q. Did Miss Sheridan or Mr. Hickox express any reaction to what they saw in the film?

A. They felt that they weren't right for it.

Q. What did Miss Sheridan say in that respect?

A. I think she said she didn't like either man.

Q. And did Mr. Hickox say anything?

A. He didn't like either man, either.

Q. Did you at any time either at this discussion or any of the discussions that you had with Miss Sheridan, or Mr. Hickox, ever express any opinion that Mr. Ryan was not right for the role?

A. No. I may have expressed an opinion that I felt that Mr. Ryan was far more suitable or was better suited than Mr. Ferrer, but I don't think that I could have said that either of them was unsuitable for the role. [327]

Q. After you had shown this film to Mr. Hickox and Miss Sheridan, "Bed of Roses," in which

(Testimony of Robert Sparks.)

Ferrer and Ryan appeared, did you then have some further discussions at a later date about the matter of securing a leading man in this picture?

A. Well, at this point it seemed Miss Sheridan had been in Europe for some months, and I had a feeling that she had not seen some of the recent pictures and had not—because there were some names of what we call the up and coming leading men that she didn't seem to be familiar with their names or faces, and I made the suggestion to her that we have at RKO 16-millimeter prints of pictures, and we can get 16-millimeter prints from other studios.

Q. You mean prints that some of these younger men that you thought were suitable for the picture had appeared in?

A. Not necessarily younger men, but new to the picture industry, men who came up. And I offered to send a projection machine and to supply Miss Sheridan with as many films as I could get, and she could run these in her home. And she told me at that time that she was having her house remodeled and had no place to run these pictures. Then I suggested that we get in some pictures from the outside and look at them. And with one thing and another we never got around to that. [328]

Q. What did Miss Sheridan say when you suggested that you would get in some pictures from the outside to show them at the studio?

A. Well, I believe she said that she hadn't seen anything that—any person that she wanted to see in a picture.

(Testimony of Robert Sparks.)

Q. Do you recall that the name of John Lund was mentioned during these discussions?

A. Yes, he was.

Q. Do you know what Miss Sheridan or Mr. Hickox said with respect to him?

A. If I remember correctly, Miss Sheridan had never seen Mr. Lund on the screen and her first reaction to him was an adverse one. I think either after I or Polan had told her something about Lund she seemed to get a little interested in him, and then the next thing I had ascertained, since Mr. Lund is under contract to Paramount, not RKO, was if Mr. Lund would be available. I think this matter was turned over to Mr. Schuessler, and I think some time later Lund was not available because he had been assigned to another picture.

Q. Did you at some time subsequent to the showing of this film, "Bed of Roses," arrange to show Miss Sheridan some other film at the studio?

A. No. Mr. Rogell arranged it. I did not arrange any. [329]

Q. Do you know what it was that was shown?

A. I think it was another scene from "Bed of Roses." I think, also, there was "The Macomber Affair"; there was a picture that had been made at the studio called "Blood on the Moon."

Q. Who appeared in that picture?

A. Robert Preston. I don't recall. There were two or three other pictures that at least were on the list.

Q. Did Miss Sheridan make any comment to

(Testimony of Robert Sparks.)

you with respect to Robert Preston?

A. She said she didn't think he was right for it.

Q. Did she say what her reason was for not thinking he was right?

A. No, I don't know that she gave any specific reason, but she said she just didn't like him for the part.

Q. Do you recall having a conversation with Miss Sheridan after she had seen the picture "Lost Boundaries" in which Ferrer appeared, I mean a conversation with respect to his use in the picture as leading man?

A. Well, that was a running that was arranged by Mr. Rogell, and I think Miss Sheridan's comment was that he was a very fine actor, that she enjoyed the picture, but she didn't think he was right for the part.

Q. Did she say why she didn't think he was right for the part? [330]

A. No.

Q. Did she in any of these discussions with you in which she said that an actor wasn't right for the part explain what the basis for her statement was, or what her reasons were for not thinking that he was right?

A. I can't recall what reasons there were, Mr. Knupp.

Q. Do you recall whether she assigned any reasons at all in any of these discussions with you as to why she didn't think an actor was right for the part?

(Testimony of Robert Sparks.)

A. I don't think she went into it very extensively.

Q. When did the name of Franchot Tone come into your discussions, Mr. Sparks?

A. It was at one of these meetings during the afternoon we were discussing actors, and Miss Sheridan said something about Doc Tone, and I asked her if she knew Doc, and she said she knew him quite well. I said, "He is on the lot," because he was at that time editing a picture that he had made in Paris, called "The Man on the Eiffel Tower." I said, "Would you like to talk to Tone if I could get him down here?" And she said she would very much. So I called around and I think he was up on the dubbing stage, and some 10 or 15 minutes later he arrived, and we sat around in the office and talked.

Q. Then, what did Miss Sheridan say with respect to Tone? [331]

A. She said, after Tone had left the office, she turned to me and said, "Doc is my man." And I said, "That's fine, that is something that we will have to take up with Rogell and let him take it up and see how they react to it. If you like Tone for this I certainly shall submit him." So the following morning I did, to Mr. Rogell.

Q. What was the result?

A. Well, Mr. Rogell wasn't very impressed with it. He made a comment which was that he was getting a little tired of these delays, and the fact that Miss Sheridan was wearing him down to the point

(Testimony of Robert Sparks.)

that if he had his way he would accept Mickey Mouse, but he said that he would take the matter up with Mr. Hughes and see what Mr. Hughes' reaction was.

He subsequently told me that Mr. Hughes did not react well to the name of Franchot Tone, but had asked Mr. Rogell to phone Mr. Depinet in New York and see what Depinet felt about it; that he had phoned Depinet and Depinet reacted very adversely to it, and told Mr. Rogell that this is a costume picture, which is not a very salable piece of film anyway, and that he needed every cast asset that he possibly could have to help him in the sale of it, and to ask us to please not put Tone in the picture, but to try to get someone with a little fresher value than Tone had.

Q. You said this was a costly picture. How much was [332] the picture to cost?

A. I said a costume picture, a period picture.

Q. A costume picture. I didn't understand. What was the budget on this picture, do you recall, approximately?

A. I think it was somewhere close to one million two.

The Court: Meaning \$1,200,000?

The Witness: Yes, sir.

Q. (By Mr. Knupp): Was that at that period a costly picture and generally considered a costly picture in the motion picture industry?

A. Yes, that represented quite an expensive picture.

(Testimony of Robert Sparks.)

Q. Did you have any further discussion at the time Mr. Tone's name was mentioned with Miss Sheridan, again, about Ryan or Ferrer?

A. Well, I think I told Ann at one period in these discussions that we had—I don't know, there were five or six of them—over a period exceeding a month, that I felt she could make this very easy on herself if she accepted either Ryan or Ferrer, and I strongly advised her that of the two I liked Ryan better for the part. But she had practically no interest or no feeling about Ryan, although the part that she saw him in in "Bed of Roses" he was a romantic type, a leading man. He is considered a very virile actor.

Q. Who did he play with in that? Did you say Joan Fontaine? [333] A. Yes.

Q. Who I understand is one of the best known leading women in the motion picture business?

A. As a matter of fact, when Miss Fontaine came on the lot to make "Bed of Roses" she requested Ryan.

Q. Do you recall at the meeting where Mr. Tone's name came up and you had this discussion about whether Miss Sheridan wouldn't further consider Ferrer or Ryan, you had some discussion or Mr. Hickox made some statement about the question of what would happen if the picture didn't get started?

A. Well, I think under the terms of Miss Sheridan's contract she had 15 weeks——

Mr. Gang: Just a moment. I hesitate to inter-

(Testimony of Robert Sparks.)

rupt the narrative, but I do think Mr. Knupp shouldn't lead this particular witness, who is his own witness. I might suggest if he would get the conversation chronologically, persons present, we might get the story in a less objectionable form. I don't object; I just make the suggestion.

The Court: The answer will be sticken, anyhow, since the witness started to tell us what was in the contract. The contract is in evidence.

Mr. Knupp: I can state to the witness that the contract does require that unless Miss Sheridan's services are completed within 15 weeks from the starting date she is entitled [334] to receive additional compensation of \$10,000 a week.

There is no objection to my making that statement to the witness, if the court please.

The Court: What is your question to the witness now?

Mr. Knupp: I am asking now for the conversation that ensued at this meeting in his office with Miss Sheridan and Mr. Hickox with respect to what would be the result if the picture wasn't finished in 15 weeks?

The Witness: I think Mr. Hickox made some remark about the \$10,000 a week, and that Howard Hughes had plenty of money. Some such remark.

Q. (By Mr. Knupp): Do you recall having further conversations after this time with respect to the possibility of filling this part, Mr. Sparks, I mean with Miss Sheridan and Mr. Hickox?

A. I may have, Mr. Knupp, but around this

(Testimony of Robert Sparks.)

period I think that Mr. Rogell took over the attempt to try to get this matter solved, and I was on the fringe of some of those conversations and meetings, but I think that——

Q. Did you have any discussions with Miss Sheridan or Mr. Hickox with respect to Basehart, Richard Basehart? A. No, I did not.

Q. Do you recall now about the date on which you had your last discussion with Miss Sheridan with respect to this matter? The contract was terminated on August 17th; does [335] that refresh your recollection as to how long before that you may have discussed the matter finally with Miss Sheridan?

A. I think it must have been around the early part of August.

Q. Do you recall what Miss Sheridan told you in her last conversation with respect to the matter?

A. She told me that the actor she wanted for this part was Franchot Tone, and that all other names that had been submitted were completely unacceptable to her.

Q. Did she say what she expected or intended to do in that connection? A. No.

Q. Mr. Sparks, this picture was finally produced at the studio? A. It was.

Q. And in the production Miss Ava Gardner appeared in the role of Barbara, the leading lady?

A. She did.

Q. And Robert Mitchum as Mark Lucas?

A. He did.

(Testimony of Robert Sparks.)

Q. Do you know whether or not at the time that you had these discussions with Miss Sheridan, Mitchum was available for a part in the picture "Carriage Entrance"?

A. No, Mitchum was in a picture called "Holiday Affair."

Q. Do you know whether he had subsequent commitments [336] at the studio after he finished "Holiday Affair"?

A. The position of Mitchum was—Mr. David Selznick had half of Mr. Mitchum's contract.

Q. When you say he had half of his contract, what do you mean?

A. I mean that he held half interest in Mr. Mitchum as an actor.

Q. Was he entitled to half his time?

A. He was entitled to half his picture time. And Mr. Hughes was at that time talking about putting him in "Jet Pilot," and Mr. Selznick was talking about selling him to Warner Brothers, and in fact—that is all for that period.

Q. Do you know when it was finally determined to put Mr. Mitchum in "Carriage Entrance"?

A. Well, Mr. Mitchum reported to me somewhere around the 26th of September.

Q. When did the production actually start?

A. The principal photography started on the 3rd of October.

Q. Do you know when Miss Gardner was assigned to play the leading female role in the picture?

(Testimony of Robert Sparks.)

A. I believe this was somewhere around the middle of September, Mr. Knupp. I am not exactly sure.

Q. After Miss Sheridan's contract was terminated was [337] anything done with respect to the script?

A. The only thing that was done, I had some discussions with Mr. Rogell about it and told him that Parsonnet—

Q. Just omit your discussions with Mr. Rogell.

The Court: Did you revise the script?

The Witness: Yes, we did.

Q. (By Mr. Knupp): Was there any revision of the script after Miss Sheridan's contract was terminated? A. Yes.

Q. Do you know whether or not prior to the termination of her contract that costumes for Miss Sheridan had been finished?

A. They had been completed.

Q. And what happened to those after her contract was terminated? Were they used by the subsequent actress who took her place?

A. I believe that two of them were suitable.

Q. What happened with respect to the production staff after Miss Sheridan's contract was terminated? Was the staff continued?

A. I don't believe so, Mr. Knupp. I wouldn't know. The production department would know that.

Mr. Knupp: I think that is all.

The Court: We will take a short recess at this time.

(Testimony of Robert Sparks.)

Court will remain in session until the jury [338] retires.

Remember the admonition of the court not to discuss this case among yourselves or with anyone else, or to form or express any opinion of the case until it is finally submitted for your verdict. The jury may retire.

Court will stand adjourned.

(A recess was taken.)

The Court: The record will show that the jury are present and in their proper places.

Mr. Gang: So stipulated.

The Court: Proceed.

Mr. Gang: If the court please, may I hand to Mr. Sparks the original of his deposition taken by me on December 12, 1948, before Harold M. Liebovitz, Notary Public, so in case any questions arise it will be available to him?

The Court: You may.

Cross-Examination

By Mr. Gang:

Q. Mr. Sparks, the responsibility of a producer is a serious one, is it not? A. It is, yes.

Q. In other words, you have somewhat direct charge of the actual operations leading up to the making of the picture and until it is completed?

A. Normally, yes. In this case this was governed a great deal by Mr. Banks' relation to the picture. [339]

(Testimony of Robert Sparks.)

Q. In other words, your situation here was not a normal one? A. Abnormal, certainly.

Q. And that distinguishes it from the ordinary run-of-the-mill picture in which you acted as producer? A. Yes, sir.

Q. Is it fair to state that you were sort of a watchman for the studio on this operation?

A. That, and a messenger boy.

Q. In other words, a watchman and messenger boy, liaison is a five dollar word for that?

A. That's right, sir.

Q. You also said that this package was taken over by the studio, is that correct?

A. That was my understanding, yes.

Q. And at the time you were informed of your function for the studio you understood that the picture was ready to be made, you said?

A. That's it, yes.

Q. That meant that Miss Sheridan was to play the leading female role? A. Yes.

Q. Mr. Robert Young was to play the leading male role? A. That's right.

Q. The director had been approved? [340]

A. Yes.

Q. And the screen play or story to be made had been approved? A. Yes.

Q. Did you state in your direct testimony from whom you got this information at the studio?

A. Mr. Rogell.

Q. Did you understand at that time that this project was taken over as part of the settlement of

(Testimony of Robert Sparks.)

a lawsuit? A. I didn't know that, no, sir.

Q. Did you subsequently learn that?

A. I learned that, yes, sir.

Q. In that connection you testified on direct examination that Mr. Depinet, who was in charge of sales, I believe, said that this was not a salable film anyway. Do you remember saying that?

A. No, I didn't say "salable." I said it was not a desirable film from the standpoint of sales, because as distinguished between a modern picture, a costume picture is supposed to be, according to the precedents of this business, less appealing at the box office than the modern picture.

Q. I made a note at the time you said it, Mr. Sparks. If there is any question in your mind about the language, I will be glad to have the reporter find it. My notes say [341] that it is not a salable picture anyway. Is it possible you said that?

A. I didn't mean that. I meant as salable.

Q. You meant it is not as salable as some other film? A. As a modern film.

Q. And is that because it was a costume picture?

A. Yes. That is an old witches' tale in motion picture business, Mr. Gang. I don't know whether this is true or not, but that has been always said, that a costume picture is not as desirable from the box office point of view as a modern picture.

Q. In other words, the people who had to sell the picture for RKO were not favorably impressed with the story material, is that right?

A. Well, I don't know that they knew much

(Testimony of Robert Sparks.)

about the story material. I think they were more concerned about what the adjuncts would be from the standpoint of cast, marquee value, that is called.

Q. In your statement, whichever way you phrased it, that it was not as salable as other film, was that because of the fact that it was a costume story, a story that required that it be made as a period picture?

A. That is one of the factors, yes.

Q. It wasn't the type of story that RKO would have voluntarily undertaken to make, itself, is that right? [342]

A. That may be true.

Q. And this attitude of the sales department was communicated to you by Mr. Rogell, is that right?

A. At the point where Mr. Tone's name was submitted to Mr. Depinet.

Q. On direct examination you said that you didn't in July know what time would be required to shoot the picture?

A. That's true.

Q. Do you remember the occasion on the taking of your deposition on December 12, 1949?

A. I do.

Q. At RKO? A. I do.

Q. And you were sworn at that time and examined by me in the presence of Mr. Knupp?

A. I do.

Q. Would you look at page 41, lines 17 to 21? If you will read the questions and the answers. I ask you to read them now for the purpose of refreshing your recollection only.

Mr. Knupp: At what line?

(Testimony of Robert Sparks.)

Mr. Gang: Lines 17 to 21, Mr. Knupp.

The Witness: I have read it.

Q. (By Mr. Gang): Can you now testify from your [343] refreshed recollection as of that date, which was about July 9, 1949?

A. Do you mean as to the length of time of the schedules?

Q. Yes.

A. I think I said—your question was: “The substance of this is that assuming a mythical thirty-six-day shooting schedule, you say the maximum date,”——

Q. In other words, around the middle of July you did write Mr. Rogell a memorandum, didn't you?

A. Yes, I did.

Q. At that time you did have a revised script?

A. I did, yes.

Q. And it was after Mr. Young had refused to play the part, is that right?

A. That's right.

Q. You did write Mr. Rogell then giving him your estimate based on that script as to what the latest date was that you could start with Miss Sheridan and still finish by October 10, 1949?

A. That's right. [344]

Q. At that time you did state, did you not, that you could start as late as August 29, 1949?

A. That was based on a mythical 36-day schedule.

Q. You were in court when Mr. Schuessler testified that they had a 30-day shooting schedule?

A. Mr. Gang, at our studio, which I presume is

(Testimony of Robert Sparks.)

the same as any studio, the moment that a picture is assigned to a producer it goes to the production department and the production department almost invariably will lay this picture out in 28 days or 30 days, regardless of the fact that it may subsequently have the same picture schedule for as high as 40 or more days. This is purely for purposes of rough budget.

Q. You were still functioning when the picture was actually made, were you not?

A. Yes, I was.

Q. How many days did the shooting actually require? A. It required——

Q. From October 3rd to November 16th, the stipulation is.

A. There were around 40 days of shooting.

Q. Including retakes and added scenes?

A. Including three days, I think, of added scenes and six days of rehearsal.

Q. In other words, the actual shooting was somewhere [345] around 30, 31 days?

A. The actual shooting was 39 days.
scenes and six days of rehearsal.

A. No; actual shooting days.

Q. You had about a week's rehearsal before the shooting commenced? A. That's right.

Q. One of your functions was, you said, casting, is that right, as a producer?

A. As a producer, yes.

Q. In this particular case who did the casting of the principal roles, if you know?

A. Well, there was only one principal role to be

(Testimony of Robert Sparks.)

cast and that was the leading man. To my knowledge that was not cast until the 26th of September.

Q. To your knowledge. You had nothing to do with that, however?

A. I had nothing to do with that.

Q. Were you informed?

A. I was informed that Mitchum was assigned.

Q. Do you remember reading any items in the newspapers early in September about Mitchum and Gardner playing the role?

A. Yes, it was somewhere around the middle of September that I read in one of the trade papers one morning that Mitchum [346] had been assigned to "Carriage Entrance." I came to the studio and asked Mr. Rogell about it, and Mr. Rogell said, "Don't be too certain, I don't know how that got in the paper, because there is some litigation and argument going on between Mr. Hughes and Mr. Selznick. There is a question as to whether John Wayne will be available in 'Jet Pilot.' If Wayne is available for 'Jet Pilot,' and some arrangement can be arrived at between Mr. Hughes and Mr. Selznick, then you may get Mitchum for the picture."

Q. Before Miss Sheridan's contract was terminated, did you discuss with Mr. Rogell the possibility of getting Mitchum for the picture?

A. No. I knew the Mitchum situation. He was presently——

Q. Please, Mr. Sparks. I think we will save time if you answer my question. Did you discuss

(Testimony of Robert Sparks.)

the possibility of getting Mr. Mitchum for the part with Miss Sheridan?

A. No. I told Miss Sheridan that he was not available.

Q. Did you discuss with Miss Sheridan the getting of Mr. Mitchum for that part? A. No.

Q. Did she ask you if Mitchum could be obtained? A. She did, yes.

Q. She said she would like to have him for the part? A. She said that she would, yes. [347]

Q. What did you say when she said that?

A. I said that he was not available.

Q. Did you say that without talking to Mr. Rogell? A. I knew the situation——

Q. Answer my question. Did you say that to her without consulting Mr. Rogell? A. Yes.

Q. Had you talked to Mr. Rogell prior to that about the possibility of getting Mr. Mitchum?

A. We had gone over the entire contract with respect to players.

Q. Who is “we”?

A. Mr. Rogell and myself.

Q. When did you do that?

A. Right around the time that Mr. Young turned down the role.

Q. Was Mr. Mitchum’s name on the list——

Mr. Knupp: Just a minute, Mr. Gang. You ask the witness a question and then start another one when he gets to the middle of the answer.

The Court: He could have answered it yes or no, and then made an explanation. I was still waiting

(Testimony of Robert Sparks.)

for the answer. Go ahead and finish the answer.

Q. (By Mr. Gang): Go ahead and finish.

A. I have lost the thread of this now, Mr. Gang. [348]

Q. So have I.

The Court: Read the question and read the answer.

(The record was read by the reporter.)

The Court: I think Mr. Gang's interrogation was proper. I was trying to follow it myself. In view of the type of answer the witness made I think Mr. Gang was right in pulling him back to the question whether Mr. Mitchum's name was on that list.

Answer this immediate question and try to get back on to the other one.

The Witness: The immediate question being——

Q. (By Mr. Gang): Was Mr. Mitchum's name on the list of actors that you discussed with Mr. Rogell?

A. When I spoke of "list" may I, Mr. Gang—and I am sorry, I apologize—when I spoke of "list" I was speaking of our contract list of players. I was not referring to a list with respect to the cast of the picture. I referred to such persons as Mitchum, Ferrer, Ryan, and such other players as we have under contract.

Q. Then your answer is that Mitchum's name was on the list——

A. On the contract list.

Q. And you did discuss him with Mr. Rogell?

A. I did, yes.

Q. Was this before or after Miss Sheridan had

(Testimony of Robert Sparks.)

asked for [349] him? A. Before.

Q. You think at that time that Mr. Mitchum would have been good casting for the role?

A. I thought he would have been fine. I think Mr. Mitchum is fine in anything.

Q. You stated that you tried to reach Mr. Young after you were informed that he refused to play the part, is that right? A. I did.

Q. Can you cast your mind back to the meeting with Mr. Banks and Miss Sheridan, at which Hickox was also present, when you first discussed the situation which now existed by reason of Mr. Young's refusal to portray the role? I want you to try to fix the first meeting. Can you remember any discussion at that time about why, the possible reasons why Mr. Young turned it down?

A. Admittedly from his agent he had turned it down because the part no longer suited him.

Q. That was one of the subjects of the discussion, was it not? A. That was, yes.

Q. You then knew and discussed the reason for the turn-down, which was that in his opinion, or in the opinion of his agent, the part as rewritten was no longer big enough [350] or important enough to appeal to him, is that right?

A. No. I said appealing enough, Mr. Gang.

Q. Did they say in what respect, Mr. Sparks? I wasn't there. I will have to ask you.

A. I don't know. I think that was a matter we discussed, because we were trying to determine why

(Testimony of Robert Sparks.)

Mr. Young, if he accepted the script in the first instance, turned it down in the second.

Q. In that conversation was anything said about the reasons for that? In other words, let me put it to you this way: Didn't somebody say that in the revision the part had been written down so that it wasn't any longer important enough for a man of his stature?

A. I don't recall that, Mr. Gang, no.

Q. Perhaps this will help you recall it. You said in your direct testimony that you called Mr. Goldstone on the phone to see if you could not get an opportunity to fix the script?

A. I called him to see what he wanted done with it so we might fix it in case he didn't like it, but I don't as I sit here now know the specific reason why Mr. Young turned down this part, because I never have talked with Mr. Young about it, either at that time or since.

Q. I suggest to you that Miss Sheridan on that occasion told you that she was not surprised he turned it down [351] because the revision had minimized his part. Does that refresh your recollection? A. She may have said that.

Q. Did Mr. Banks say anything about that?

A. He may have. I don't know.

Q. So when you called Mr. Goldstone, Mr. Young's agent, to seek an opportunity to fix it you had in mind fixing it to make it more important again, isn't that so?

A. Well, the question of importance, I called to

(Testimony of Robert Sparks.)

find out exactly and specifically what Mr. Young objected to when I spoke of fixing it, and I don't know what that was, Mr. Gang.

Q. You don't at this time remember?

A. No.

The Court: As I understand it, this part of Quentin was first, on one of the rewrites of the script, written down to make it a weaker part, and then was later on written up to make it a more impressive part?

The Witness: No. I think, your Honor, the "down," at least in anything that I may have said about it, when I said "down" to bring it from what we will call a higher educational level to a lower educational level. In other words, a man—this is a rather strong man, rather than a man just engrossed in books.

The Court: You mean written down in that sense? [352]

The Witness: In that sense, yes.

The Court: Go ahead.

Q. (By Mr. Gang): May I refer you, Mr. Sparks, to page 55 of your deposition, line 9?

"Q. Then you started looking for a leading man. With whom did you start looking?

"A. Well, we had lost two possibilities that we had for leading men, because in the meantime Mr. Bob Ryan and Mr. Mel Ferrer had become, due to not being used elsewhere, had become available to the Skirball unit, and we then started to go over the possibilities of a leading man. This was a leading difficulty, be-

(Testimony of Robert Sparks.)

cause we had a role that was—I presume some source of information that furnishes the agents the problems of the studios—I think everyone was acquainted with the fact that this is what they referred to as a weak sister of a leading man role, and it was a leading difficulty to try to find someone who could satisfy the box office requirements of the picture, because this was an expensive picture, and who could play the part.”

Do you remember so testifying?

A. I do, yes.

Q. Does that refresh your recollection now as to the [353] problem you had with the part after the revision?

A. I stated, Mr. Gang, that this was a woman's picture, this essentially was a story about a woman, there were three leading men, there was no single leading man, and the part of the professor was one of the three persons, and it is always a problem when you have a strong leading feminine role to find a strong leading man to go with her, especially when she outshines him, because there is a certain professional standing that is something that actors understand that I won't attempt to discuss that would make them feel that they might be playing a subordinate role, and the part of the leading woman in "Carriage Entrance" was always the star role. She has at least 75 per cent of the story. It is something about her and not about anybody else.

Q. It is a fact, isn't it, that up until the time

(Testimony of Robert Sparks.)

Mitchum was assigned to the role the problem of the Dr. Quentin part was always a serious one?

A. Very serious.

Q. And it is a fact, is it not, that the story and the scripts, even your revised one, were in such shape that the part played by Melvyn Douglas was a much more colorful one from an actor's point of view?

A. That has been true from the very beginning, Mr. Gang.

Q. You had a story problem in that respect from the very [354] beginning, did you not?

A. True.

Q. And in the revisions from the story in the form in which it was when Mr. Young had approved it, until he disapproved it, something happened to weaken the role even more than it originally was, isn't that so?

A. I would say perhaps shorten it, Mr. Gang, yes.

Q. And it was your opinion at that time, and I am talking about July of 1949, that the professor, who was the Dr. Quentin part, was something of a jerk and not a strong character at all?

A. It was in that script, yes, sir.

Q. And those are your words, are they not, Mr. Sparks?

A. That's true.

Q. And he remained a weak character up until the time Mr. Mitchum was assigned to the role, did he not?

A. We were strengthening the part as best we

(Testimony of Robert Sparks.)

could all along throughout our various writing phases.

Q. It is a fact, the role was rewritten in September in order to have it available for Mr. Mitchum to play it?

A. It was rewritten the latter part of September, yes.

Q. To make it worthwhile for Mr. Mitchum?

A. To make it more desirable, shall we say.

Q. And when you said before you could not understand Mr. Young's reasons for refusing to play the part in the [355] revised script, is your recollection now refreshed, can you tell us whether you then did know what his reasons were?

A. I did not know his reasons, Mr. Gang, from any contact with Mr. Young.

Q. But you did know from the discussion with Miss Sheridan and Mr. Banks?

A. They had made some mention, yes.

Q. What I am trying to fix is that you did know then and reported to Mr. Rogell why in your opinion Mr. Young had turned the part down?

A. I did.

Q. Did you discuss revising the part while you were discussing other possibilities for a leading man?

A. We may have, yes.

Q. And did Mr. Banks and Mr. Parsonnet continue to work on the script?

A. They did, yes.

Q. And to discuss it with you? A. Yes.

Q. I did understand you to say that you would

(Testimony of Robert Sparks.)

have welcomed an opportunity to fix the part up for Mr. Young if he would reconsider his decision, is that right? A. True.

Q. You got no second chance at that?

A. None. No first chance, Mr. Gang. [356]

Q. Well, I mean there was no chance to change his mind? A. True.

Q. May I direct your attention to the meeting at which the name of Mr. Tone first came up. Who was present on that occasion?

A. Mr. Hickox, Miss Sheridan, Mr. Banks, myself, and I don't recall whether Mr. Stevenson was there or not.

Q. And can you remember how long this was after you had had your first meeting at which Mr. Young's refusal had become public knowledge?

A. No, I can't exactly, Mr. Gang.

Q. Would it be sometime between the 10th, 11th or 12th of July and the middle or end of July?

A. It would be, I should say, yes.

Q. And during this period of time this was a matter of some importance to you, was it not, Mr. Sparks? A. Yes.

Q. You knew that you had a time limit within which to use Miss Sheridan's services, is that right?

A. True.

Q. And it was therefore important to get on with the ascertainment of who would be designated as the leading man? A. That's right.

Q. In this meeting, then, that was the primary subject [357] for the conference, was it not?

(Testimony of Robert Sparks.)

A. With Mr. Tone, you mean?

Q. No, with Miss Sheridan? A. Yes.

Q. And can you remember at this time whether the conference was called at your office by you or by Mr. Banks?

A. I think Mr. Banks arranged all the meetings.

Q. And it was after discussion with you, was it not? A. Yes.

Q. And the purpose of that was to discuss with Miss Sheridan possible actors who might be available to play the leading role?

A. Yes, we always met for that purpose.

Q. And Miss Sheridan did come to your office?

A. Yes.

Q. And you did have a meeting?

A. We did.

Q. Do you remember how long this particular one lasted? A. No, I don't recall.

Q. Can you remember taking out the two or three or four-inch volume called the Casting Directory on this occasion?

A. Many times, yes, sir.

Q. I want now to have you direct your attention, if you can, to the occasion on which you say the name of Mr. [358] Tone was first mentioned, that is the meeting I am now inquiring into. Can you remember that on that occasion you did get your copy of the Casting Directory and go through it?

A. I probably did, Mr. Gang.

Q. Your "probably" won't do us much good, because I really want you to testify to your best

(Testimony of Robert Sparks.)

recollection, Mr. Sparks, and if you don't remember it, we are all human here, and I would prefer you to say you don't remember, rather than to have you guess just to make me happy.

A. I don't remember. I would say that I probably did, but I don't remember.

Q. You do remember that the name of Franchot Tone was mentioned? A. I do, yes.

Q. Isn't it a fact that you first mentioned the name at that conference? A. I may have.

Q. And isn't it a fact that you mentioned his name while you were leafing through the Casting Directory?

A. We mentioned many names. I probably did, yes.

Q. That is your best recollection at this time, that you did? A. Yes.

Q. When you mentioned his name did you say "Mr. Tone" [359] or "Franchot Tone" or "Doc Tone"? What did you call him?

A. I never knew him as Doc Tone. That is Miss Sheridan's name. I always knew him as Franchot.

Q. When you mentioned his name you mentioned his name as Franchot Tone? A. Yes.

Q. It was then Miss Sheridan said she hadn't seen Doc Tone in a long time?

A. That's right.

Q. Did you ask her at that time whether she thought he might do for the part of Quentin?

A. I think what was said at that time was, I asked her if she might like to see Franchot, that he

(Testimony of Robert Sparks.)

was around the studio, he was on the lot, if she would like to see him I would get him for her.

Q. What did she say?

A. She said she would like very much to see him.

Q. Did you then have him come to your office?

A. I did, yes.

Q. You were present, as you stated, when they talked?

A. I was.

Q. They talked nothing about the picture at that time, did they?

A. Nothing.

Q. He was there about 10 or 15 minutes? [360]

A. At least that.

Q. Or longer?

A. Yes.

Q. And he left and left you and Miss Sheridan and Mr. Banks and Mr. Hickox in the room?

A. He did.

Q. Did you then pursue the subject of the possibility of Mr. Tone portraying the role of Quentin?

A. Miss Sheridan said—I believe if I remember her correct words, she said, “Doc Tone is my man,” and that ended the meeting. It was near the close. She stood up as she said it.

Q. You took this to mean that Mr. Tone had her hearty approval as the casting for that role?

A. I did.

Q. What did you say?

A. I said that I would take it up with Mr. Rogell and see what his reactions to it were.

(Testimony of Robert Sparks.)

Q. May I ask what you said about your own opinion at that time?

A. I said he is a man that probably could play it. I will take it up——

Q. It was for that reason that you suggested his name in the first place, is that correct?

A. I didn't suggest his name in the sense of casting. [361]

Q. In what sense did you suggest his name?

A. This casting directory, as we went through it, for some particular reason this day I happened to mention Franchot Tone's name, and Miss Sheridan said—she said something like "Old Doc Tone?" and I took from that that she knew him. I asked her if she wanted to see him, and she said yes.

I said, "He is on the lot. We can get him in the office if you would like to have a talk with him." So some 10 or 15 minutes later he came down there.

Q. Your present recollection is that Miss Sheridan used the phrase at that time, "That's my man," or "Doc is my man"?

A. "Doc Tone is my man." Some phrase of that sort.

Q. Will you look at page 87 of your deposition referring to this meeting. I won't read all of it. I will direct your attention to line 24, in which you said, "After he left Ann got up and said, 'Well, that is the leading man, that is the leading man I want. I want him for my leading man.'"

Did you so testify, Mr. Sparks? A. Yes.

Q. This is December of 1949. Was your recol-

(Testimony of Robert Sparks.)

lection then that those were the words she used?

A. It was at that time, yes, I guess. [362]

Q. Has anything occurred since then that brings the phrase "Doc is my man" to your mind?

A. No.

Q. You did not on direct mention these names, or at least not some of them, so I will ask you: Can you remember any discussions in July or early in August with Miss Sheridan and Mr. Banks with reference to Wendell Corey?

A. No, I do not.

Q. Were you not informed by Mr. Banks of his trip to the Paramount lot to look at a picture?

A. I did not hear that until he was on the stand. I did not know that that had happened.

Q. You said that the name of John Lund was mentioned, however?

A. It was, yes.

Q. And Miss Sheridan did, after first being ignorant of his performance in "Foreign Affair," she did subsequently tell you that she would approve him?

A. She would like—she said she would consider him. I don't believe she said "approve."

Q. Did you notify Mr. Schuessler or Mr. Rogell that Mr. Lund's availability should be checked because Miss Sheridan indicated she would approve him?

A. I did.

Q. And do you know that a script was actually sent by [363] RKO to Paramount?

A. I didn't know that a script had been sent.

(Testimony of Robert Sparks.)

I thought Mr. Schuessler was checking whether he was available or not.

Q. Did anybody tell you that he became unavailable because they didn't like the script?

A. Later, yes.

Q. You mentioned the fact that Robert Preston was in a picture called "Blood on the Moon"?

A. I did.

Q. Miss Sheridan saw that? I don't know whether you were present on that occasion or not.

A. I think that was one of the pictures that was to be run for her, yes.

Q. Do you remember that he played a cowboy in that with a four-day growth of beard, in the picture shown to Miss Sheridan?

A. He might have been.

Q. In her discussions with you after that didn't she mention the fact that he wasn't physically the type for the esthetic part of Dr. Quentin?

A. That is true.

Q. Do you remember when you discussed the possibility of Mr. Ryan, that Miss Sheridan said that he was a big man with a physique of a prize-fighter, which he portrayed in the [364] picture, and not physically suited for that part, do you remember such a discussion?

A. I do remember the discussion, but the discussion was based on the earlier conception of the script, not the script that we were in the process of strengthening.

Q. You do remember, however, she did give as

(Testimony of Robert Sparks.)

a reason to you at one time or another during these conferences the fact that her reason for thinking Mr. Ryan was not suited for the part was physical?

A. He didn't look like a professor, some such remark.

Q. She did say something like that to you?

A. Yes.

Q. With reference to Mr. Preston she did say that he wasn't physically suited for the part?

A. She may have.

Q. What did she say to you about Mel Ferrer?

A. She said she didn't like him at all for it.

Q. Did she give you a reason for it?

A. I don't recall that she did. I had some sympathy with Miss Sheridan's point of view about Mel Ferrer. I much preferred Bob Ryan.

Q. Perhaps this will refresh your recollection. Do you remember a discussion with Miss Sheridan in which she said that Mr. Ferrer would be much better for the part that Melvyn Douglas was assigned for? [365]

A. Perhaps yes.

Q. Such a conversation could have taken place?

A. Yes, that could have taken place. It perhaps did.

Q. You at this time don't remember?

A. It may have.

Q. Have you any present recollection as to how many times you went through the Casting Directory with Miss Sheridan looking for possibilities?

A. I would say four or five.

(Testimony of Robert Sparks.)

Q. On any of these occasions was the name of Richard Conte mentioned?

A. I don't recall Conte's name.

Q. Were you present in court when Mr. Schuesler testified? A. Yes, I was.

Q. Do you remember his testimony with reference to a discussion with Twentieth Century-Fox about borrowing Richard Conte?

A. I do, I remember that.

Q. And about their request for a script?

A. I remember his testimony, yes.

Q. Does that refresh your recollection as to Miss Sheridan having told you that she would approve Richard Conte to play this role? [366]

A. I don't recall Conte's name in our conversation, Mr. Gang.

Q. What was the occasion on which Miss Sheridan was introduced to Mr. Berns, the head of your make-up department?

A. I think that was perhaps either her first or second visit at the studio.

Q. Were you informed as to what Miss Sheridan did thereafter with reference to make-up, hairdress, costume?

A. I think she and Mr. Berns either met up in the make-up department or perhaps in wardrobe and they discussed the question of her hairdress and her make-up, and the assignment of the make-up people and hairdressing people to the picture.

Q. From July 6th of '49 on to August 16th,

(Testimony of Robert Sparks.)

1949, Miss Sheridan came to the studio on each occasion when requested by you?

A. Well, I don't know that I made a direct request, but Mr. Banks would call her. If you mean did she refuse, she never refused, to my knowledge, to come to the studio.

Q. That is what I wanted to know. Any request you, as a producer, had to make of her was complied with? A. Yes.

Q. This had to do with meeting the make-up man, the hairdress man, and the costume [367] designer? A. True.

Q. And you had records of the fact, did you not, in your office, and knew that Miss Sheridan checked the sketches with the designer and subsequently spent a day being fitted, is that right?

A. She did, yes.

Q. You did testify that you told Miss Sheridan that she could make it easy on herself by taking either Robert Ryan or Mel Ferrer, do you remember so testifying? A. I did, yes.

Q. On which occasion did you make this statement to Miss Sheridan?

A. I don't recall, Mr. Gang. It was probably the latter part of July. I would say it would be towards the latter end of July.

Q. Can you give us the context in which you made that suggestion?

A. I don't recall it completely now.

Q. May I now direct your attention to the conversation you related briefly about somebody saying

(Testimony of Robert Sparks.)

that Howard Hughes had a lot of money and he could afford \$10,000 a week. Do you remember that testimony? A. Yes.

Mr. Knupp: Are you referring to what he testified in the deposition? [368]

Mr. Gang: No. I am referring to what he said on direct. I just wanted to make such that Mr. Sparks remembered testifying with reference to such a subject this morning.

The Witness: I do.

Q. (By Mr. Gang): You do? A. Yes.

Q. Isn't it a fact that that particular conversation took place not in your office, but walking on the lot?

A. No, that conversation took place as Mr. Hickox left my office, we left it together.

Q. And who else was with you, with you and Mr. Hickox?

A. I don't know. We were filing out of the office. I don't know who was ahead or behind.

Q. And it is a fact, isn't it, Mr. Sparks, that Miss Sheridan was there, too?

A. Could have been.

Q. And walked ahead of you and Mr. Hickox?

A. Yes.

Q. And isn't it a fact that you are the man that said Mr. Hughes has a lot of money, \$10,000 a week wouldn't bother him? A. Absolutely not.

Q. Didn't the subject arise because somebody said, "You had better get on with this picture, time is running"?

(Testimony of Robert Sparks.)

A. I think I made the remark that we had better hurry [369] along with the picture and get it started because time was running out.

Q. And at that date you were aware of the fact that time was running? A. Yes.

The Court: While we are talking about time running, it reminds me it is noontime.

We will take our recess until 2:00 o'clock.

Ladies and gentlemen of the jury, you will remember the admonition of the court not to discuss this case among yourselves or with anyone else, or form or express any opinion on the merits of this case until it is finally submitted to you for your verdict.

The jury may retire. Court will remain in session.

(Whereupon the jury retired from the court room.)

The Court: Anything further? 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p.m. of the same day.) [370]

Thursday, February 1, 1951—2:00 P.M.

The Court: The record will show that the jurors are in their proper places.

Mr. Gang: Agreed.

Mr. Knupp: Yes, so stipulated.

(Testimony of Robert Sparks.)

ROBERT SPARKS

called as a witness by and on behalf of the defendants, having been previously sworn, was examined and testified further as follows:

Cross-Examination

(Resumed)

By Mr. Gang:

Q. When we broke for lunch, Mr. Sparks, you had just stated that in a conversation between you and Mr. Hickox a remark was made about it costing Mr. Hughes \$10,000 a week, and I ask you if you recognize Mr. Hickox in the court room now?

Will you stand up, Mr. Hickox, please?

(A man stood up.)

Q. (By Mr. Gang): Is that the gentleman?

A. Yes.

Q. Will you please repeat that conversation as best you remember it, what you said and what he said?

A. We had finished one of our conferences about the [371] cast, and as I remember it, Miss Sheridan and Mr. Banks, I believe, had gone out ahead of us, and Mr. Hickox and I were going out the door of my office, I think we may have been going up to Mr. Rogell's office, and I made some remark that we were wasting a lot of time, to which Mr. Hickox answered that he didn't mind that because Mr. Hughes didn't mind the \$10,000 a week.

Q. What did you say?

(Testimony of Robert Sparks.)

A. I made no comment at all.

Q. What did Mr. Banks say?

A. I don't think Mr. Banks was in on this conversation.

Q. Or Miss Sheridan? A. I believe not.

Q. That is your present recollection?

A. Recollection, yes.

Q. Did you report that conversation to Mr. Rogell? A. No.

Q. Can you fix the date of that? Was it at or about the time that Mr. Tone's name came into the discussion?

A. I believe it may have been after, I think that is when it was.

Q. I don't wish to confuse you. May I refer you to your deposition, page 88, bottom of page 88, and the top of page 89, which indicates that in December of 1949 when your deposition was taken you placed that conversation as after [372] the meeting at which Mr. Tone's name had been mentioned.

A. Well, it was after, I don't know whether this was immediately after, or whether this was another meeting, I don't recall now.

Q. At the top of page 89 you said, after mentioning Mr. Tone's name, "With that she and Hickox left the office." Does that refresh your recollection that it was on that date that the conversation took place? A. Yes.

Q. May I ask you now to direct your attention to the picture "Bed of Roses." Did you see the

(Testimony of Robert Sparks.)

entire picture with Miss Sheridan? A. No.

Q. Just excerpts?

A. We saw one day's dailies, and I believe at another time when I was not present she was shown some other parts of it.

Q. Can you remember at this time what type of character Mr. Ryan portrayed in "Bed of Roses"?

A. Well, Mr. Ryan, in "Bed of Roses" was a writer.

Q. What did he look like physically? Like Ernest Hemingway?

A. No; he looked like a very normal writer as we know writers.

Q. Wasn't he a rough, tough-looking [373] writer? A. No.

Q. Mild, meek?

A. No, I wouldn't say that. I would say he was quite normal.

Q. Will you describe his physical appearance in the picture?

A. Well, it was Robert Ryan, there was no attempt whatever to make him appear otherwise.

Q. He is a big man, isn't he, physically?

A. He is a man, I should say, six feet or better tall.

Q. And he has rather rough-hewn features, hasn't he?

A. Perhaps they might be considered so.

Q. And the part he played was of a writer in the realistic style, may I say? A. A writer?

Q. Like Hemingway, would you say?

(Testimony of Robert Sparks.)

A. He played a writer. I don't know Mr. Hemingway.

Q. You have seen pictures of him and remember his writings?

A. I have read his writings.

Q. In your opinion he wouldn't be a rough, tough writer in that picture?

A. No, I don't think so.

Q. One last subject, Mr. Sparks, which is this: Do you have any recollection of discussing with Miss Sheridan [374] her desire to talk to Mr. Hughes?

A. Well, I think she expressed such a desire, and I think at the time it was discussed I suggested that she go to Mr. Rogell and have Mr. Rogell set up an appointment, which I believe was subsequently done.

Q. In that talk with you did she tell you that the reason was that she wanted to get a leading man appointed so the picture could go on?

A. I think she wanted to make a personal appeal to Mr. Hughes to accept Mr. Tone, I believe.

Q. Did she say that?

A. I think that was the point.

Q. Was it restricted to that alone, is that your best recollection?

A. I believe so.

Q. She didn't say anything about any other leading man?

A. I don't recall that any other leading man was discussed.

(Testimony of Robert Sparks.)

Q. Could she have mentioned Mr. Mitchum, too?

A. I don't believe so, no. I would say no.

Q. You are not certain about it?

A. I am not certain about it.

Q. You are sure, however, that it was Miss Sheridan's desire to talk to Mr. Hughes? [375]

A. I am that, yes.

Q. And you agreed that she should talk to Mr. Hughes? A. Definitely.

Q. You also wanted somebody in the part, did you not? A. I did, yes, sir.

Q. Did you subsequently talk to Miss Sheridan after she met with Mr. Hughes?

A. I don't believe that I had any discussions with Miss Sheridan regarding her meeting with Mr. Hughes. I think that was at the point where Mr. Rogell and Miss Sheridan and Mr. Hickox were engaged in trying to finalize this decision.

Q. Is it fair to say that the last time that you talked to Miss Sheridan that you now remember was a time at which she wanted to see Mr. Hughes about getting a leading man for the part?

A. I believe that was the last time.

Q. And the next thing you remember was reading in the paper that Miss Sheridan had been fired?

A. That's it.

Mr. Gang: Thank you.

(Testimony of Robert Sparks.)

Redirect Examination

By Mr. Knupp:

Q. Mr. Sparks, I think you once made some mention of a list of contract writers at the studio. Will you tell me [376] exactly what you meant by contract writers?

The Court: I think you are talking about contract actors, aren't you?

Mr. Knupp: Actors, I mean. I beg your pardon.

The Witness: Well, contract actors are actors that are under contract to the studio for purposes of utility and build-up in the pictures of that studio.

Q. (By Mr. Knupp): And is it to the advantage of the studio to use the contract actors when possible? A. It is.

Q. For what reason?

A. Well, because these become part of the assets of the studio, a name value that can draw at the box office is always certainly an asset to a studio, and it is the policy, I believe, of all studios in town to have such actors and actresses under contract.

Q. You said that this picture came to the studio as a package deal and you explained what you meant by a package deal. Was it also advantageous to the studio that the package should have been arranged before it came to the studio?

A. That is normally my interpretation of a package. I would assume so, Mr. Knupp.

Q. So when it came to the studio it was prac-

(Testimony of Robert Sparks.)

tically ready to produce? A. Yes. [377]

Q. With respect to the revisions of this script prior to the time that it was submitted to Robert Young, what was the situation so far as the role of the leading man was concerned with respect to whether or not that role was weaker or stronger than after it was submitted to Mr. Young?

A. Well, the script and the story was always a woman's story.

Q. By that you mean——

A. I mean that the male lead, so-called, was always secondary to the feminine role, and I think that it had been condensed and strengthened in desirability from an actor's point of view in the revisions which we had made of it.

Q. Prior to the time that it was submitted to Mr. Young? A. Yes.

Q. And then after Mr. Young refused the role I think you said there was some additional writing before Mr. Mitchum was assigned, is that true?

A. Yes, sir, there were two additional scenes put in the picture, two additional short scenes.

Q. But did that change the over-all effect, so far as the picture being a woman's picture?

A. No, it did not.

Q. In what respect did it improve the character of Mark Lucas, if at all? [378]

A. Well, I imagine in substance it only improved the length of time that he was in the picture.

Q. You said something about Miss Sheridan having had certain wardrobe fittings and having looked

(Testimony of Robert Sparks.)

at certain sketches at the studio. Do you know just what Miss Sheridan did with respect to her wardrobe or any other matters relating to wardrobe or make-up?

A. Well, actually, Mr. Knupp, those were matters that were handled by the heads of the respective departments. I know that we had a costume designer, Mr. Travilla, there, and I know Miss Sheridan made herself available to Mr. Travilla for such discussion of wardrobe; I know, also, she did the same with respect to Mr. Berns who is the head of make-up. Just specifically and comprehensively what that was I couldn't answer that.

Q. Do you know whether or not the wardrobe for Miss Sheridan had been completed prior to the termination of her contract? A. It had been.

Q. Do you know how late that was in August, if it was in the month of August?

A. I cannot recall the exact date.

Mr. Knupp: I think that is all.

Mr. Gang: One question. [379]

Recross-Examination

By Mr. Gang:

Q. Robert Mitchum was a contract actor, was he not? A. He was, yes.

The Court: You may step down, Mr. Sparks.

(Testimony of Robert Stevenson.)

ROBERT STEVENSON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Knupp:

Q. What is your name, Mr. Stevenson?

A. Robert Stevenson.

Q. Where do you live?

A. In Los Angeles.

Q. What is your business or occupation?

A. Film director.

Q. How long have you been so engaged?

A. As a film director since 1932.

Q. And prior to that time did you have any experience in the motion picture business?

A. I was working pictures since 1928, except during the war when I was in the Army.

Q. In what capacity were you employed? [380]

A. Originally as a reader, then as a writer, then as a producer, then I became a director.

Q. For what companies have you been employed in making pictures?

A. For the first 10 years for Gaumont-British and associated companies in England; for the next 11 years for David O. Selznick; and for the last two years for RKO.

Q. And during the time that you worked for

(Testimony of Robert Stevenson.)

Mr. Selznick or for RKO you had been engaged in the business as a director?

A. As a director, sir.

Q. What are the functions of a director in the motion picture business, Mr. Stevenson?

A. Before the picture goes to the stages to be shot, the director works with and under the producer in the preparation of the picture, but not on the business side, only on the so-called artistic side. When the picture goes to the stages, the director is supposed to guide and control the work of the actors and the technicians who are making the picture.

Q. And direct the action of the actors on the stage?

A. And direct the action of the actors.

Q. When were you assigned to the picture "Carriage Entrance"?

A. I don't remember the date, sir. [381]

Q. Do you remember whether it was before or after Robert Young refused the role?

A. My impression was that it was two or three days before.

Q. Were you at that time familiar with the basic story or the script for the picture?

A. I read the script and the book as soon as I was allotted to the picture.

Q. Did you do any work in connection with the revision of the script?

A. In conference with Mr. Parsonnet and Mr.

(Testimony of Robert Stevenson.)

Sparks, I think I was present at all the script conferences from that period on.

Q. Was Mr. Banks at those conferences?

A. He was at some of the conferences, but not all.

Q. You were familiar with the script, then, in its original form when you first saw it, I mean that was before there was any rewriting that had been done?

A. Yes, I read one script; I understand there were two, I only read one script, the so-called actor's script.

Q. Was the script that was first shown to you a completed script, or was part of it in synopsis form? A. I don't remember.

Q. After the script was rewritten what in your opinion was the effect so far as the character of Mark Lucas was [382] concerned as to whether or not it was a better or worse part?

A. In the original rewriting or the final result?

Q. In the original rewriting.

A. In the original rewriting the part of Lucas was shortened, but it was considerably improved from an actor's point of view, because the part as written by Atlas was the part of a weakening.

Q. How was it changed in the rewriting?

A. The character was given a more positive and dynamic quality.

Q. Was that the script that was submitted to Young and refused by him?

A. That I don't know, sir.

(Testimony of Robert Stevenson.)

Q. Then when the script was rewritten further before Mr. Mitchum was assigned to the role, what changes were made?

A. The character was further developed in the same direction we were going in the transference from the Atlas script. In fact, each version of the script made the character more positive and more dynamic, less of a weakling and esthete. My memory is that two extra scenes were added after Mr. Mitchum was assigned to the picture.

The Court: Do I understand you that the original script when you first saw it had the character of Mark Lucas as sort of a weakling? [383]

The Witness: Yes, sir.

The Court: Had weakness in his character?

The Witness: Yes, your Honor.

Q. (By Mr. Knupp): Did you have any part in any of these conferences with Miss Sheridan about a possible replacement for Robert Young?

A. I was present at one.

Q. Do you recall what occurred at that conference?

A. The only thing I remember was I suggested——

Mr. Gang: May we have the time and place?

Q. (By Mr. Knupp): Just a minute. Mr. Gang suggests the time and place. Do you recall when you had that conference?

A. No, sir. I can recall the place. It was in Mr. Sparks' office.

(Testimony of Robert Stevenson.)

Q. Do you remember about the day?

A. No, sir.

Q. Who was present?

A. I remember that Miss Sheridan was present and Mr. Sparks was present, Mr. Banks was present; I don't remember if anyone else was present.

Q. Do you remember what occurred at that conference?

A. My own memory was that I advocated Bob Ryan for the picture.

Q. You say you advocated. To whom did you advocate? [384] When you say advocated, Mr. Stevenson, we don't understand exactly what you did. Will you tell us what you said or did in that respect?

A. I can't remember exactly what I said, but what I do remember is at every opportunity I brought forth the name of Bob Ryan because I thought he was the ideal man for the part.

Q. Were you familiar with the work of Robert Ryan in pictures, Mr. Stevenson?

A. Yes. I had made a picture with him about six months earlier.

Q. What picture was that?

A. "I Married a Communist."

Q. Had you seen his work in other pictures?

A. Yes, sir.

Q. What other pictures that you can recall?

A. The name escapes me. That boxing picture that has been referred to, in which he played the part of a prize fighter.

(Testimony of Robert Stevenson.)

Q. Is that the "Set-Up"?

A. "Set-Up." I have seen not all but most of the footage of "Bed of Roses."

Q. In which he appeared with Joan Fontaine?

A. Yes, sir.

Q. And in which, also, one of the other actors who has [385] been mentioned here appeared?

A. Yes, sir.

Q. Who was that other actor?

A. Mel Ferrer.

Q. You say you thought that Mr. Ryan was the ideal man for this part in this picture?

A. Yes, sir.

Q. Why do you say that, Mr. Stevenson?

A. Principally because I had worked with him, and if a director has worked with an actor he is in a much better position to judge what he can do than if he had just seen him on the screen, and I had worked with Ryan, and I knew exactly what he could do and what he couldn't do, and in my opinion he seemed right for the picture.

Q. You have heard these other people mention Mel Ferrer?

A. Yes, sir.

Q. What was your opinion with respect to the question of whether Mel Ferrer might have been proper casting in this part?

A. My opinion of Mel Ferrer was he was a very fine actor, I felt he could have been satisfactory in the part, but it would have been necessary to re-write certain scenes to fit his particular type of personality.

(Testimony of Robert Stevenson.)

Q. You were familiar with the work of Robert Preson? [386]

A. Yes, sir.

Q. Did you have an opinion as to whether or not he might have been proper casting in this part?

A. My opinion was that he would have been unsuitable.

Q. What about Richard Basehart?

A. I don't remember Basehart's name being brought up at the conference that I was present at.

Q. You hadn't considered his name? At any time that you were present there was no consideration of Basehart's name?

A. I don't remember.

Q. When you say that you considered that Robert Ryan would have been the ideal casting for this part, you took into consideration the script as it was when Young turned down the role and Robert Ryan was being discussed?

A. In terms of the Parsonnet script, I don't know exactly which one Mr. Young turned down. If I may qualify my answer. The best actor available. Obviously other actors at other studios who were unobtainable would have been better.

The Court: You are qualifying your answer as to who—Ryan?

The Witness: Yes, sir.

Q. (By Mr. Knupp): You mean that you think that he was only the best of the actors who were available, but do you mean [387] to say that you have any question in your mind as to whether he would have been proper casting for the part?

(Testimony of Robert Stevenson.)

A. No, I have no question in my mind.

Mr. Knupp: I think that is all.

Mr. Gang: May I have the exhibits, Mr. Clerk?

Cross-Examination

By Mr. Gang:

Q. I will show you, Mr. Stevenson, Plaintiff's Exhibit 19, dated August 4, 1949, being an excerpt from a memorandum from Mr. Schuessler to Mr. Hughes, and ask you to read it.

You stated that you were present at only one conference with Miss Sheridan?

A. To my memory, yes, sir.

Q. The memorandum which I have shown you, dated August 4, 1949, refreshes your recollection as to a discussion that you had with Mr. Schuessler? I will read it so the jury might hear it, too.

"After a session with Bob Stevenson this morning we learned that the character of 'Quentin,' which everybody has turned down, is being changed into a more intriguing character, and he asked if you would let him have Bob Ryan?"

Now, my question is, Mr. Stevenson, does this memorandum refresh your recollection as to the session that Mr. Schuessler [388] here related?

A. No, sir.

Q. You don't remember that at all?

A. No, sir.

Q. Do you remember asking anybody if you could have Robert Ryan?

(Testimony of Robert Stevenson.)

A. No, sir. I always assumed he could be had if it was agreeable to everybody.

Q. Now, have you any way at the present time of fixing the date on which, in your own words, you were allotted to the picture? Did you mean allotted or did you mean assigned? I wrote it down. I may have misheard you.

A. Either word.

Q. In other words, have you any way of fixing now the time at which you were told that you were to direct the picture "Carriage Entrance"?

A. No, sir.

Q. Did someone give you a written slip telling you that you were assigned?

A. No, sir.

Q. How did you find out? Did somebody tap you on the shoulder or whisper in your ear?

A. I asked Mr. Sparks—if I may explain——

Q. Please do.

A. I was at one time assigned to "Jet Pilot," and I [389] asked to be taken off that because I didn't think that it was a picture that I could handle properly myself. I was then without a picture. Mr. Hickox called me one day, and I believe at my home, and told me that this picture had no director——

Mr. Knupp: When you say "this picture," do you mean "Carriage Entrance"?

The Witness: "Carriage Entrance."

I borrowed a copy of the novel, I liked the novel. I knew that Mr. Sparks was connected with the picture, so I asked him whether it would be possible for me to be assigned to the picture. And

(Testimony of Robert Stevenson.)

if my memory is right, about two days later he told me that I was assigned to the picture.

Q. (By Mr. Gang): In other words, Mr. Sparks told you in so many words that you had been assigned to direct the picture? A. Yes, sir.

Q. Can we take the next step and see if you can fix that time with reference to the 4th of July of 1949? I suppose that holiday doesn't mean as much to you, perhaps, as it does to some of us, but does it register in your mind as a date from which you can take off? A. No, sir.

Q. When you got into the picture on the first conference you are sure that Mr. Young was no longer connected [390] with the project; that is a fact, is it not?

A. No, sir, I stated it was my impression that I came on the picture two or three days before Mr. Young——

Q. Before he had refused the picture?

A. Before he left the picture.

Q. How did you then come to advocate using Robert Ryan if Mr. Young was still in the picture?

A. I didn't advocate using Robert Ryan when I first came on the picture, sir.

Q. I understood you in your direct testimony to say that at this conference, the one conference you attended with Miss Sheridan, you advocated using Robert Ryan. Am I mistaken?

A. No, you are correct.

Q. Was Mr. Young still in the picture?

A. No, sir.

(Testimony of Robert Stevenson.)

Q. Then you are mistaken in saying he had not refused the picture?

Mr. Knupp: The witness didn't say that at all, Mr. Gang.

Mr. Gang: Let me start all over again.

Q. (By Mr. Gang): You had one conference with Miss Sheridan? A. Yes, sir.

Q. On the occasion of that conference had Mr. Young [391] refused to do the picture?

A. Yes, sir.

Q. He had refused to do the picture?

A. Yes.

Q. Therefore, when you came on it was sometime after July 11th or 12th, is that right, if that date is the date on which the studio officially knew that he was not to do the picture?

A. I don't follow you, sir.

Q. I am sorry. I will try to make myself clear. I am trying to fix the date on which this one conference took place. If I state to you that Mr. Young's official refusal reached the studio on July 12, 1949, that fixes that date for that event, is that clear in your mind, sir? A. Yes, sir.

Q. Now, you have said that when you had that conference Mr. Young had refused to do the picture? A. Yes, sir.

Q. And who told you that he had refused to do the picture?

A. I wouldn't remember, it is so long ago.

Q. It was a subject of discussion, however?

A. Well——

(Testimony of Robert Stevenson.)

Q. In other words, the post of leading man was vacant, is that right? [392]

A. At the time of this conference.

Q. Yes, yes. And one of the reasons for the meeting at which you were present was to get the benefit of your advice as to a possible replacement?

A. Yes, sir.

Q. Was any other name mentioned at that one conference besides your advocacy of Mr. Ryan?

A. I don't remember, sir.

Q. You remember only your advocacy of Mr. Ryan? A. Yes.

Q. Now, let me ask you if the name of Charles Boyer was mentioned at that meeting?

A. I don't remember. I think if it had been I would remember.

Q. Was the name of John Lund mentioned at that meeting? A. I don't remember, sir.

Q. Was the name of Wendell Corey mentioned?

A. I don't remember, sir.

Q. Was the name of Richard Conte mentioned?

A. I don't remember.

Q. Franchot Tone? A. I don't remember.

Q. You don't remember whether his name was mentioned at all?

A. I don't remember whether it was mentioned at that [393] meeting.

Q. That is what I am talking about, Mr. Stevenson. A. No.

Q. Then in answer to the questions of Mr. Knupp with Mel Ferrer, Robert Preston, and

(Testimony of Robert Stevenson.)

Richard Basehart, you were not talking about that meeting, you were just answering questions generally? A. Yes.

Q. Your answer would be that Mel Ferrer, Robert Preston, and Richard Basehart were not mentioned at this one conference?

A. My answer would be that I do not remember whether they were.

Q. I am only asking you as to your own memory, Mr. Stevenson. You did say that you advocated Ryan as the ideal man for the picture?

A. Yes, sir. The ideal man available.

Q. What do you mean by the word "available" as you use it?

A. In the sense that it is used in film business, meaning an actor who can be obtained to do the part if he is wanted.

Q. You stayed on the picture until it was finished, did you not, Mr. Stevenson?

A. Yes, sir. [394]

Q. Did you complain when Mr. Mitchum was assigned to it in place of Mr. Ryan?

A. No, sir.

Q. Who told you that Mr. Mitchum would play the part? A. I don't remember.

Q. Were you consulted as to whether Mr. Mitchum would be suitable for the part?

A. I don't think so.

Q. And the assignment of Mr. Mitchum, therefore, came as a surprise to you, Mr. Stevenson?

A. I think so.

(Testimony of Sid Rogell.)

Q. A welcome one? A. A welcome one.

Mr. Gang: Thank you, sir.

Mr. Knupp: Mr. Rogell.

The Court: Are you through, Mr. Knupp?

Mr. Knupp: Yes. I have no further questions.

The Court: You may step down, Mr. Stevenson.

Before you leave, I would like to ask you did you direct "Carriage Entrance" when it was made?

The Witness: Yes, your Honor.

Mr. Gang: I asked that.

The Court: If you did, I didn't hear it. [395]

SID ROGELL

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Sid Rogell.

Direct Examination

By Mr. Knupp:

Q. Where do you reside, Mr. Rogell?

A. Los Angeles.

Q. And what is your business?

A. Motion pictures.

Q. How long have you been engaged in the motion picture business? A. About 25 years.

Q. In what different capacities have you worked?

A. Well, started in as production assistant, assistant director, studio manager, producer, executive producer.

(Testimony of Sid Rogell.)

Q. By what studios have you been employed?

A. I have been with RKO for the last 15 years up until May of this year. Previous to that at Columbia for several years. Is that sufficient?

Q. In what capacity did you serve at RKO?

A. I went to RKO in 1936 as studio manager and remained in that position for seven or eight years; subsequently became executive assistant to the late Charles [396] Koerner, who was vice-president in charge of production; I was changed to a capacity known as executive producer by him, and subsequently changed from that capacity by Mr. Hughes to executive producer in charge of the studio directly under Mr. Hughes.

Q. As executive producer in charge of the studio what were your duties and functions, Mr. Rogell?

A. Well, they were certainly varied. I was in charge of getting out the program of pictures, buying stories, hiring writers, producers, casting of the pictures, looking after the cutting, that is, the editing of those pictures, putting the music in them, seeing that they got to New York on time, and the general problems of making a motion picture.

Q. That is, you had the administrative duties, as well as the executive functions of seeing that the pictures were actually produced and ready for distribution?

A. That is correct.

Q. I understand you to say that you are no longer employ by RKO?

A. That is correct.

(Testimony of Sid Rogell.)

Q. And your employment was terminated in May of 1950? A. That is correct.

Q. Were you familiar with the steps that were taken by RKO prior to the time that it entered upon the production [397] of this picture, entered into the contract for its production?

A. In a general way, yes.

Q. What was the situation when RKO first became interested in producing the picture?

A. This picture was first presented to us as a so-called package; an agent, Mr. Goldstone, offered the studio a story and screen play "Carriage Entrance," with a producer Polan Banks, with a star Ann Sheridan, with a leading man Robert Young, represented by that agent, and also under a so-called multiple picture deal with RKO. There were reasons why we considered this favorably.

Q. And what were those reasons, Mr. Rogell?

A. Well, we certainly thought that Miss Sheridan was a very important actress at the time, she had co-starred with Gary Cooper and subsequently with Cary Grant; we thought the story was adequate, although we had some reservations about a costume picture; we liked the idea of using up a commitment with Robert Young.

Q. What was the situation between Young and the studio at the time?

A. Well, he was under contract at the time, I believe, for one picture a year, and those dates come around when you either have to use them or find yourself in default, and this was a convenience to

(Testimony of Sid Rogell.)

use him, he was very satisfactory [398] to us for the part, and had also been approved by Miss Sheridan. We also found at that time, while we were negotiating, that we could use another so-called commitment with a studio contract actor, Melvyn Douglas, an old commitment, and a lot of money involved, in the same picture, in a part for which he was ideally suited. So altogether it looked like a good corporate move to make this picture.

Q. Were you familiar with the script which had been prepared of the screen play at that time?

A. Yes.

Q. Do you recall whether or not now the script had been completed at that time?

A. I believe that a part of it might have been just in outline, but it was acceptable, because we knew we had time to complete it, and it certainly indicated what the balance of the story was going to be.

Q. And Miss Sheridan had approved any one of three men as a director——

A. I believe that's correct.

Q. ——at the same time she entered into the contract?

What was done by you, if you did anything, with respect to assigning somebody as a director to the picture?

A. Well. eventually we both agreed upon Mr. Stevenson.

The Court: "We both agreed"—who do you mean?

(Testimony of Sid Rogell.)

The Witness: I mean both parties; Miss Sheridan and the [399] studio.

Q. (By Mr. Knupp): And did you take any steps in connection with the assigning of somebody to assist as a producer of the picture?

A. Yes, we had some misgivings about Mr. Banks, who has admitted that he had not produced pictures theretofore. He was amenable to having one of our producers, Mr. Sparks, associate himself with the picture. He had agreed that Mr. Sparks might be given credit on the screen as executive producer, and he would still retain his credit as producer. This was satisfactory both to Sparks and to Banks, and we also conferred with Miss Sheridan, who I believe knew Mr. Sparks and thought he would be very satisfactory.

Q. You have mentioned the names of the three principal members of the cast. What if anything was done with respect to securing the minor members of the cast, the remaining members of the cast?

A. There was little or nothing done at the time, because the minor parts seldom furnish a problem. No one would find it difficult to get together on those subordinate parts, I don't believe. It never became an issue, to my knowledge.

Q. In RKO what was the process by which it was determined—I am speaking now of this time in April of 1949—what was the proceeding by which the star parts were [400] cast?

A. The principal casting, I believe, not only at RKO but at any studio, is usually left up to the

(Testimony of Sid Rogell.)

head of the studio. By that I mean Mr. Hughes, even over me. It was up to the casting office, Mr. Banks, director, producer, Sparks, Rogell, to put down their best suggestions and take them up with Mr. Hughes. I think this would be the same in any studio when it comes down to the very top members of the cast.

Q. When did you first ascertain, Mr. Rogell, that Mr. Young would not portray a role in this picture?

A. The date escapes me, but I found out by reason of a phone call when Mr. Nat Goldstone called me and told me.

Q. Was that prior or subsequent to the time that you received a letter from Mr. Goldstone?

A. I believe the phone call preceded the letter.

Q. Do you know whether that phone call came before or after the script had been sent in? I am speaking now of the Parsonnet script.

A. I am not——

Q. Had been sent in to Mr. Goldstone.

A. I presume it was after he received the script, because he commented on the script.

Q. So that if the script went to Goldstone's office on the 7th or 8th of July, and you got this letter of refusal [401] on the 12th, the telephone conversation to which you refer occurred sometime between those two dates?

A. We got the letter on the 12th, did you say?

Q. You got the letter back from Goldstone's office on the 12th, yes.

A. Then I believe the phone call was in between.

(Testimony of Sid Rogell.)

Q. And after you had received this information from Mr. Goldstone's office what steps did you take in an attempt to fill this role?

A. Well, I informed everyone concerned that Mr. Goldstone didn't want to play the part—pardon me, that Mr. Young didn't want to play the part, and that we would have to get busy and look for subsequent or additional names to submit to Miss Sheridan and to Mr. Hughes for this part. That was then the responsibility of the casting office, the director, the two producers, who were immediately concerned with the picture.

Q. Did you have any conversations with Miss Sheridan with respect to the matter?

A. Well, that began a series of conversations which went on from then on.

Q. Do you have any way of fixing the date of the first of these conversations, Mr. Rogell?

A. Well, I would say that shortly after, if that letter—if the telephone conversation was sometime between [402]—what is it, July 8th and 12th, you say?

Q. July 8th and 12th.

A. Along in there, if we found out Robert Young wasn't going to perform, that within a few hours or certainly before the next day we had informed Miss Sheridan of the situation. And, as a matter of fact, if I may say so, we didn't think it was too serious that Mr. Young wouldn't perform. We thought it would be only a routine matter, as those things transpire, and we would be able to settle

(Testimony of Sid Rogell.)

on someone else. But it didn't seem to be a real obstacle at the time.

Q. Can you fix approximately, please, Mr. Rogell, the date on which you had your first conversation with Miss Sheridan with respect to the matter?

A. I would say July 13th or 14th.

Q. Where did the conversation occur?

A. This may have been on the phone. Miss Sheridan, I believe, lives out in San Fernando Valley, and I didn't want to have her come clear to the studio just to say something to her which might have been said on the phone. On the other hand, she was coming in quite regularly at that time.

Q. Did you have any conversations with her at the studio? A. Many of them. [403]

Q. About when do you think you had the first of your conversations at the studio?

A. In regard to this matter?

Q. In regard to this matter, yes.

A. Shortly thereafter, shortly after we learned that Robert Young was not going to perform, and possibly even before the letter was received confirming that.

Q. Where did this conversation take place?

A. Ordinarily in my office.

Q. Was Miss Sheridan alone or was she accompanied by anybody?

A. She was, I believe, always accompanied by Mr. Hickox.

Q. It is your recollection now that every time

(Testimony of Sid Rogell.)

you talked to Miss Sheridan she came to your office in the company of Mr. Hickox?

A. I believe that's the fact.

Q. Can you tell us—and I don't expect you to remember these dates, I don't expect you to remember exactly what was said in any of these conversations that happened two years ago, Mr. Rogell—but can you tell us the substance of your first conversation with Miss Sheridan and Mr. Hickox, and what either or both of them said and what you said with respect to this casting?

A. Well, this precipitated many meetings and conversations [404] by telephone and in my office, or in the studio's commissary or on the lots, wherever we would meet, about this particular problem, and we were constantly suggesting people back and forth. She made suggestions and we made suggestions. I don't remember which day which people were mentioned, but it gets down to all of the names that have been mentioned hereinbefore.

It began—perhaps this is what you are getting at—when Mr. Hughes was informed that Mr. Young would not perform, and perhaps it would be fitting that I say that Mr. Young under his contract with us had a right to refuse this—we went into this deal because one of the facets of the deal was that Young would perform, but his own contract with RKO, aside from this Ann Sheridan picture, provided that he might have as many as two pictures submitted to him, and if he canceled out as many as two, then we might cancel the commitment. So

(Testimony of Sid Rogell.)

while we might have brought more pressure to bear in this particular instance, his own individual contract with the company permitted him to say no, and therefore we didn't pursue that. We went on and looked for other casting.

When I told Mr. Hughes that Young was not going to do the picture or didn't want to do it, he felt as I did that it wasn't a catastrophe——

Q. Mr. Rogell, I suggest to you that your conferences [405] with Mr. Hughes and what he may have said to you are not admissible here in evidence.

A. I was just going to get at what was said then as to how we arrived at submitting who we wanted to take the place of Robert Ryan—Robert Young if he wanted it.

Q. You can tell us what you did in that respect or what you said to Miss Sheridan and Mr. Hickox.

A. Following that I suggested that they consider either Mel Ferrer or Robert Ryan to replace Robert Young.

Q. Did you make this suggestion at some conference that you had at your office?

A. Yes.

Q. What did Miss Sheridan and Mr. Hickox say in that respect?

A. They were not immediately impressed with the idea of using either one. I think Miss Sheridan knew little or nothing about Mel Ferrer at the time. He was and still is a comparative newcomer, but he had made a big hit in one picture, and was sub-

(Testimony of Sid Rogell.)

sequently put under contract to RKO. Robert Ryan they knew something about, but would look at film, and subsequently did.

Q. Had Mr. Ryan made some pictures for RKO prior to that time?

A. Mr. Ryan made several pictures for RKO.

Q. And were you familiar with the work that Mr. Ryan had done at the studio?

A. Very familiar.

Q. And were you of the opinion at that time that Mr. Ryan was good casting for this part in this picture?

A. My opinion is that he would have been excellent in the part.

Q. And Mr. Ferrer, you say, had made only one picture at that time?

A. He may have made more pictures, but I am only aware now of one picture in which he had appeared as an actor. He has directed some pictures.

Q. What was your opinion of his ability as an actor?

A. I think he is a fine actor, but I frankly shared Miss Sheridan's opinion about him for this role and didn't press for her to accept Mel Ferrer. I suggested him, as I was instructed to, but I could not enthusiastically insist that he was right for the part. I didn't feel that way about Ryan.

Q. You say you didn't feel that way about Ryan. How did you feel about Ryan?

A. As I have just said here, I felt Ryan would be fine in that part.

(Testimony of Sid Rogell.)

Q. Did you express that opinion to Miss Sheridan?
A. On several occasions. [407]

Q. Was this question of the appointment of Robert Ryan or Ferrer discussed with Miss Sheridan on more than one occasion?

A. Would you repeat that, please?

Q. Was this matter of the appointment of Ryan or Ferrer to this part in the picture discussed with Miss Sheridan on more than one occasion?

A. Yes, sir, it became the bone of contention for several weeks during which we had many meetings.

Q. During the course of these meetings was the name of any other actor suggested by you to Miss Sheridan?

A. Yes, during these meetings we would suggest other players for the part to her and she in turn to us.

Q. Will you give me the names of some of these other players that were suggested or proposed by you?

A. We first of all hoped to sell for the part either Ryan or Ferrer, but did suggest as an alternate Robert Preston, whom we thought could play it very adequately.

I on one occasion suggested John Lund, a player under contract to Paramount Studios.

In the latter meetings out of desperation I suggested Charles Boyer, not enthusiastically, but just threw the name out, as I say, out of desperation.

Miss Sheridan thought it had some merit, and even though I didn't feel that it was going to go

(Testimony of Sid Rogell.)

very far we decided to [408] find out if the man was even available or in this country, which is the first thing to do. There is no use talking about an actor that you can't get.

Q. Is that all that was said about Charles Boyer?

A. No; his name was mentioned, bandied around from then on, but never taken very seriously, in my opinion.

Q. What about Basehart, was his name mentioned?

A. Yes, Basehart's name was mentioned, and I am trying to think of some of these other names.

We suggested Basehart as being a possibility for the part. He, too, is rather a newcomer. He certainly was a couple of years ago when this took place.

Q. Van Heflin?

A. Van Heflin was mentioned, and Miss Sheridan didn't think that he was quite right for the part.

Q. What did you think about Preston? Were you familiar with his work, Mr. Rogell?

A. Yes, I am very familiar with Preston's work. I had just used him in a picture which I had personally produced for RKO, called "Blood on the Moon," in which Robert Mitchum and Bob Preston were costarred. I thought he was not only the type, he is a big, virile, handsome man, he has a very good circulation—by that I mean he has played with important people, and I can't remember when he had less than costar billing, which is important

(Testimony of Sid Rogell.)

from a picture [409] standpoint. In "Blood on the Moon" he did a very fine job, and because a year or so ahead of that he had played in a picture with Gregory Peck called "The Macomber Affair," which has been referred to here, he came off very well in very fast company. People, so to speak, thought he stole the picture. And that was the picture I thought if Miss Sheridan would look at she would find more favor in her consideration of him than having seen him in this western, because it was a little closer to what he had to do in the "Carriage Entrance" part.

The Court: Did you hear what Mr. Stevenson said about the character of Quentin or Mark Lucas?

The Witness: Yes.

The Court: It was a character that had an element of weakness in him?

The Witness: Yes.

The Court: Would you use a big, virile man in that kind of a part?

The Witness: Yes, you can. As a matter of fact, the picture that I am talking about, "The Macomber Affair," he played a cowardly husband who went out—this is a Hemingway classic—who went out to Africa to prove that he wasn't afraid to hunt tigers, to prove to himself. So it was a case in point, if I may say so. But the virility of the man, the fact that he is big, there is a certain characteristic [410] facially in these people that sometimes comes through. Preston is about the same size as Mitchum who finally played it, and

(Testimony of Sid Rogell.)

who it has been testified here everybody would have loved to have had in the part. So the size of the man physically didn't have too much to do with it.

Q. (By Mr. Knupp): Do you recall, specifically, Mr. Rogell, what Miss Sheridan or Mr. Hickox said with respect to these proposals that you made? For instance, let's take Ryan, what did Miss Sheridan say about Ryan?

A. Well, Miss Sheridan—unfortunately, the first film that Miss Sheridan saw of Mr. Ryan were some scenes from a picture he had just finished called "The Set-Up" in which he played a broken-down prize fighter with cauliflower ears, and it was just the portrait of a broken-down fighter, and it certainly wasn't proper for her to try to expect from what she saw on the screen that this was the man to play something completely different.

We later on tried to reinterest her with more suitable film, such as "Bed of Roses."

Q. She saw "Bed of Roses" or part of it, did she not? A. She did eventually, yes.

Q. What sort of role did Ryan play in that?

A. In "Bed of Roses" he played the romantic lead opposite Joan Fontaine, an adventuress, devil-may-care writer, romantic, exciting, we hope, we thought. [411]

Q. Did she express any opinion about Ryan after she saw it?

A. She thought that was better, but she still didn't think he was right for the part.

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(Testimony of Sid Rogell.)

Q. Did she say why she didn't think he was right?

A. Well, I believe she did say he is too rugged or too virile, or words of that kind. Nothing too specific.

Q. Do you recall what she said with respect to Ferrer?

A. She thought Ferrer was a very good actor, but not right for this part.

Q. What about Preston?

A. Preston she didn't think was a very good actor and didn't think he was right for the part.

Q. Did she express any opinion of Van Heflin?

A. I don't recall.

Q. Now, Mr. Rogell, were these actors who have been named, Ryan, Ferrer, Basehart, Preston, and Van Heflin, all available for this part?

A. I am sure that they were at the time or we couldn't have been considering them seriously.

Q. Do you recall how long these conversations continued? You said they started shortly after the 12th of July, 1949; do you recall how long they continued?

A. Well, they continued intermittently every two or three days, it seems to me, until the day after the meeting [412] with Mr. Hughes, which I believe was August 16th.

Q. The meeting with Mr. Hughes was on August 15th.

A. The following day they came up and looked at film, and I believe that was the end of the dis-

(Testimony of Sid Rogell.)

cussions.

Q. Do you know how this meeting with Mr. Hughes was arranged?

A. The meeting with Mr. Hughes was arranged as a result of Mr. Hickox calling me and saying that Ann would like to see Howard. And I called Mr. Hughes and told him that, and believe it or not, we got in there that afternoon.

Q. Who was present at that meeting?

A. I think Mr. Hughes, Miss Sheridan, Mr. Hickox, and myself. I believe that was all.

Q. Do you recall the conversation that occurred at the meeting? A. Yes, quite well.

Q. Will you state to the jury as nearly as you can the substance of what was said at that meeting and by whom?

A. Well, after the usual social amenities were exchanged, Mr. Hughes asked Miss Sheridan if she wouldn't reconsider her turn-down, so to speak, of both Ferrer and Mr. Ryan, why wouldn't she use them, and she in turn wanted to know why he wouldn't consider her request to use Franchot Tone.

I think those were the only names involved seriously at [413] the time, except—pardon me—Robert Preston.

We were only there 10 or 15 minutes. It ended up with Mr. Hughes persuading Miss Sheridan to come to the studio the following day to look at excerpts from certain films in which these three players had appeared.

I was to, in order not to run the whole of all of

(Testimony of Sid Rogell.)

these pictures, to select certain reels from a picture called "Caught," in which Robert Ryan had appeared, certain scenes from "Bed of Roses" for both Ryan and Ferrer, they were both in that picture, scenes which I don't believe Miss Sheridan had seen theretofore, and it was probably my suggestion that she look at "The Macomber Affair," or some of it for Robert Preston.

Miss Sheridan agreed that she would do it, and we were going to get together the next day and look at the film.

That is, in essence, what happened.

Q. What sort of a picture or what sort of a role had Ryan played in "Caught," do you recall?

A. Yes, in the picture "Caught" he was an industrial tycoon. It was a modern picture, it wasn't a western or anything, and he was aggressive, strictly an individual. I don't know how else to explain it without trying to relate the story.

Q. Did the name of Franchot Tone come into the conferences that you had with Miss Sheridan and Hickox at any [414] time prior to this meeting with Mr. Hughes?

A. Yes, the name of Franchot—

Q. When was the name of Franchot Tone first brought into the discussions?

A. The first time I heard Franchot Tone's name mentioned in connection with this picture was an occasion when I was walking from my automobile in the morning to my office, I passed Mr. Sparks' office and he saw me coming and stopped me, and

(Testimony of Sid Rogell.)

we went inside for a moment in the morning, and he said, "Ann Sheridan would like us to consider Franchot Tone for the lead in this picture." And I said, "Well, right offhand I don't think that is very important casting."

He said, "Well, they are old friends, she ran into Tone here on the lot, Tone was on the lot in another capacity, and she would like us to consider him very seriously, she is quite anxious to have him."

Q. And did you submit his name to Mr. Hughes?

A. I did. I felt at the time that Sparks and I were in accord that he wasn't very exciting casting for this part. I suggested it to Mr. Hughes, and he didn't care for it at all.

Q. And did you convey that information to Miss Sheridan? A. Yes, I did. [415]

Q. And did she thereafter again ask for the assignment of Mr. Tone to this role?

A. Yes.

Q. Just tell me what her attitude was, if you will, Mr. Rogell, with respect—as evidenced by her conversation with you—with respect to the assignment of Mr. Tone to this role.

A. From the time that Mr. Tone's name was submitted by Miss Sheridan to me or through Mr. Sparks, she was adamant about having him in the part, and on every occasion——

Q. Just a minute. This word "adamant"——

Mr. Gang: Also, Mr. Knupp asked you to state

(Testimony of Sid Rogell.)

the conversations, not attitudes or opinions, please.

The Witness: I am sorry.

The Court: All right. The jury will disregard the conclusion of the witness. The word "adamant" and so forth may go out.

Q. (By Mr. Knupp): Just state what she said in these various conversations with you with respect to Franchot Tone.

A. In every meeting that we had concerning the leading man Miss Sheridan repeatedly asked for Mr. Tone, and we would sit and discuss different people and different occasions and she would still end up saying she wanted Tone.

Q. During all these meetings that you had with Miss [416] Sheridan and Mr. Hickox did she ever indicate her approval to you of anybody except Tone?

A. No. On the occasion, as I said, when Boyer's name was mentioned, or suggested very late in these discussions, she did listen and gave me the impression that that had some merit and we should go further. In other words, she might have accepted Mr. Boyer. She didn't just say "No" immediately when he was mentioned. But to the others she had said, "No," pretty consistently.

Q. And that was as far as the consideration of Boyer went?

A. Yes, because we ourselves in mentioning it didn't take it very seriously, and it was really suggested to indicate that we were trying our utmost to find other names regardless of where they might

(Testimony of Sid Rogell.)

come from, just not to put the whole matter of casting aside but to show our indication of wanting to continue to find other people, if possible.

Q. I understand that this meeting with Mr. Hughes took place on August 15th, and on the following day Miss Sheridan and Mr. Hickox came to the studio to look at some film. Will you tell us what occurred on that occasion?

A. They came over to the studio, I find according to my notes, after lunch. I took them up to the projection room in the same building above my office and they were to look at these films which had been mentioned. They were [417] only up there probably 20 minutes, or possibly——

Q. Was there anybody with them at the time?

A. Not to my knowledge. I don't recall that there was anybody with them, just the two. I didn't feel, when they came back to my office, 20 to 30 minutes later, that they had had time to see all of the films which they had agreed to look at, and that proved to be the case. Miss Sheridan came into my office and said, "I have seen this film of Ryan and I still don't like him for the part. Ferrer isn't right for it. I want Tone."

I said, "What about Preston?"

She said, "He isn't right for it. I didn't even look at the film."

Q. Did anything else occur at that time so far as you can now recall?

A. Nothing that stands out in my memory except that she ended up saying she wanted Tone.

(Testimony of Sid Rogell.)

And when they did leave my office I was under the impression that this was just——

Mr. Gang: Just a moment.

Mr. Knupp: Just a moment.

Mr. Gang: I am interested in impressions, but unfortunately it is not good evidence.

The Court: Counsel have been very decent on both sides about objections, but we have to——

The Witness: I am sorry. [418]

Q. (By Mr. Knupp): At this time in August of 1949 what was the situation with respect to Robert Mitchum as to his availability?

A. Well, he was in a picture and scheduled to go into one, if not two, immediately upon getting through with that picture. He was scheduled for several pictures by the studio. Presumably not available.

The Court: By RKO?

The Witness: RKO, yes.

Q. (By Mr. Knupp): What eventually happened with respect to those pictures in which he was scheduled to appear? A. Well——

Q. What I am getting at is this, Mr. Rogell: Mr. Mitchum according to the evidence here was assigned to "Carriage Entrance" and commenced the production of the picture—commenced the performance of his services in the picture about the 26th of September. What happened between the time, the date in August to which you have referred, and the date in September when he commenced to perform his services?

(Testimony of Sid Rogell.)

A. Well, he had to finish the picture that he was in.

Q. In August?

A. I believe he was in a picture "Holiday Affair" at that time, and scheduled, we thought, to go into a picture [419] called "Jet Pilot" upon completing that picture. It developed that we put John Wayne into "Jet Pilot," and because this picture didn't go as we had hoped with Miss Sheridan, we put him in "Carriage Entrance" when it got before the camera.

The Court: By "him" you mean Mitchum?

The Witness: Mitchum, yes.

Q. (By Mr. Knupp): Was there any particular reason why the studio wouldn't have wanted to assign Mr. Mitchum to the same picture with Miss Sheridan?

A. Why the studio wouldn't want to?

Q. Yes.

A. Mitchum, in the first place, was busy, as we have related here, and we felt that with Miss Sheridan we could use a less valuable, less costly, less important leading man.

Q. In other words, with the services of Miss Sheridan she would carry the picture?

A. With an adequate leading man.

Q. And you felt that Robert Ryan was such an adequate leading man?

A. We thought so, yes.

Q. When did Miss Ava Gardner become available for this picture, when was she employed?

(Testimony of Sid Rogell.)

A. When it appeared that the picture was—the whole [420] project was stopped because we couldn't get together on leading men, we found ourselves casting in desperation. The sets were all built, and so on, a lot of people had been hired, the staff, mostly, and I believe that Mr. Hughes made this arrangement personally with Metro-Goldwyn-Mayer.

Q. Do you mean that Miss Gardner was employed by Metro-Goldwyn-Mayer?

A. She is under contract to Metro-Goldwyn-Mayer.

Q. And was borrowed from that studio for this express part? A. That is my impression, yes.

Q. And that happened, of course, sometime after the contract with Miss Sheridan was terminated?

A. That is correct.

Q. Do you know how long after the termination of the contract with Miss Sheridan that was?

A. I believe there was a period of 10 days or two weeks when we didn't know what was going to happen, or whether we were going to go ahead or abandon the picture, or just what the result would be.

Mr. Knupp: I think that is all.

The Court: We will take our afternoon recess at this time.

Ladies and gentlemen of the jury, remember the admonition of the court not to converse about this case among [421] yourselves or with others or form or express any opinion on the merits until the case

(Testimony of Sid Rogell.)

is finally submitted to you for your verdict. The jury may retire.

Court will now recess.

(A recess was taken.)

The Court: The record will show that the jury are in their proper places.

Mr. Gang: Agreed.

The Court: Proceed, Mr. Gang.

Cross-Examination

By Mr. Gang:

Q. I think you said that this deal originally came to RKO as a package.

A. That is my recollection, yes.

Q. Were the original negotiations with you or Mr. Tevlan?

A. I believe the original negotiations were with Mr. Tevlan.

Q. Did you have anything to do with those negotiations, Mr. Rogell, in 1948?

A. I don't believe so, no.

Q. I think you said the package consisted of the story, Mr. Banks, Miss Sheridan, and Robert Young?

A. I believe that is right.

Q. I understood you to say that one of the reasons you [422] were interested was that it gave you the opportunity to use up some commitments?

A. That is correct.

Q. One of them was a commitment with Mr. Melvyn Douglas?

(Testimony of Sid Rogell.)

A. That developed later, but it became an essential incentive for us.

Q. At the time the deal was negotiated the commitment that you were using up was Robert Young, is that right? A. That is correct.

Q. Were you a party to the negotiations which resulted in the contract between Mr. Banks' corporation and RKO in the early part of '49?

A. I was.

Q. Were you also active for the defendant when the contract was terminated by RKO?

A. Active in what capacity?

Q. In the steps which were taken which resulted in the termination by RKO of the contract with Polan Banks Productions?

A. I personally had nothing to do with the legal procedure.

Q. I meant as an executive, not as a lawyer. I know you are not a lawyer. [423]

A. I don't quite know how to answer that, Mr. Gang.

Q. Were you personally deputized to do anything with reference to the actions which resulted in the termination of the contract between RKO and Polan Banks Productions?

A. I was not.

Q. Do you remember——

A. Are you talking about the termination of this deal?

Q. The one that preceded this one, Mr. Rogell.

(Testimony of Sid Rogell.)

The Court: The contract between Polan Banks and RKO.

The Witness: I don't think so. I don't recall what happened there, as a matter of fact.

Q. (By Mr. Gang): Were you aware of litigation being filed by Polan Banks Productions, Inc., against RKO in March of 1949?

A. That's right, I remember that.

Q. Does that in any way refresh your recollection as to the events which preceded that law suit, of your own knowledge? If you don't know, say so.

A. I remember, if I may think out loud.

Q. Please.

A. That the original deal didn't jell for some reason, and that Mr. Goldstone prevailed upon me to try to take the thing over, as we subsequently did, as an RKO venture, because Polan Banks had sunk a lot of money into it, he was [424] willing to take Sparks or someone else as a producer with him, et cetera, and I threw my weight on that side and tried to put the thing back on the track. Is that what you mean? A. Yes.

Q. You came into the thing after there was litigation? A. That is correct.

Q. And you were acting for RKO in arranging matters so that the litigation was settled?

A. That is right.

Q. And part of the settlement was what you have just described as taking over the venture by RKO, is that right? A. Correct, that is right.

Q. You mentioned the fact that the casting of

(Testimony of Sid Rogell.)

stars is the function in most studios of the top executive, Mr. Rogell?

A. I believe that is standard practice, yes.

Q. And in that respect, Mr. Hughes functioned for RKO? A. That is correct.

Q. He was the top executive?

A. That's right.

Q. And final decisions on these matters were made by Mr. Hughes? A. Correct.

Q. And the final decision as to who would direct the picture had to be approved by Mr. [425] Hughes? A. That is right.

Q. There was during the time here in question a committee which functioned at RKO Studios on Gower Street, is that correct, Mr. Rogell?

A. Up to a time, yes.

Q. I speak from the time April 29th to and including September 1, 1949. Wasn't there a committee which met once or twice a week?

A. When Mr. Hughes took over he turned the activities of the studio over to a committee, of which I was one facet, a committee of three. That committee ceased to function, I believe, in October, '48.

Q. And what happened after that?

A. After that, because one of the facets of that committee, Mr. Tevlan, had left the studio and did not return until after I left the studio, the committee no longer functioned as a committee, but I was responsible to Mr. Hughes with other people advising me, including Mr. Youngman and Mr.

(Testimony of Sid Rogell.)

Lockhart, who were on the committee. To the best of my recollection the committee as such ceased to function about October, '48.

Q. And from that time on you had sort of a sub-committee which advised you and you took the matters up with Mr. Hughes, is that fair?

A. No, I wouldn't say that. I was really running the [426] show under Mr. Hughes. I conferred with other people there as it was necessary, but there was no other sub-committee.

Q. Running the show, in your own words, Mr. Rogell, did you designate Mr. Stevenson to direct "Carriage Entrance"?

A. After conferring with Mr. Hughes, he would tell me that he approved of that, and I would instruct whoever was concerned.

Q. Instead of making it general, will you tell me what you did?

A. I did. I was telling you how it worked.

Q. In this particular case do you remember where you saw Mr. Hughes? A. No, I don't.

Q. Was it on the phone, perhaps?

A. It could have been.

Q. It is a fact that Mr. Hughes at no time function on the RKO lot, isn't that so?

A. To the best of my knowledge he did not functioned on the RKO lot, isn't that so?

Q. And you either saw him at the Goldwyn Studios or elsewhere? A. That is correct.

Q. On these matters would you say that Mr. Hughes had the final word?

(Testimony of Sid Rogell.)

A. Exactly. [427]

Q. I direct your attention now, Mr. Rogell, to the first third of July, 1949, when Mr. Young bowed out of "Carriage Entrance"—

Mr. Knupp: Third of July?

Mr. Gang: The first third of July. I think that is close enough for my purposes.

Q. (By Mr. Gang): It was during that period of time that you first learned from Mr. Goldstone that Mr. Young would not play the part?

A. Correct.

Q. And your testimony was that you first heard it over the telephone? A. That is correct.

Q. I understood you to say that Mr. Goldstone commented on the script? A. Right.

Q. What did he say?

A. He told me on the phone that particular morning that he was sorry to tell me that Robert Young did not choose to play the part; that he had read the script and despite his original enthusiasm for it he thought that his part had been impaired or played down; he thought that the whole script had been improved and didn't think that we should go and change the script to build his part up again, but that he would just like to be excused from doing it. [428]

Q. What did you say to Mr. Goldstone?

A. I told Mr. Goldstone that we were certainly disappointed to hear it and we would take it under advisement. Something general of that kind. It was rather a shock.

(Testimony of Sid Rogell.)

Q. I understood you also to say that you did not pursue Mr. Young, words to that effect?

A. That is correct.

Q. You earlier said one of the reasons you took this property over was that it gave you an opportunity to get rid of a commitment with Mr. Young?

A. To use up a commitment we had with him, yes.

Q. Was there any reason why you didn't pursue Mr. Young?

A. In my own opinion I didn't think it became a formidable problem. I thought it would be reasonably simple to replace Mr. Young.

Q. Did you inform Mr. Hughes of the occurrence? A. I did.

Q. What did he say? A. I believe——

Q. If you remember.

A. I believe he told me to try to get Miss Sheridan to accept either Mel Ferrer or Bob Ryan.

Q. Did you use the phrase "try to sell her on Mel Ferrer or Robert Ryan"? [429]

A. Yes, I believe that is motion picture terminology.

Q. You did have a talk with Miss Sheridan about Mel Ferrer and Robert Ryan, you said?

A. I did.

Q. And Miss Sheridan talked to you again after she saw some film in which Mr. Robert Ryan appeared? A. Right.

Q. And in which Mr. Ferrer appeared?

A. Yes.

(Testimony of Sid Rogell.)

Q. I understood you to say that you agreed with her about the unsuitability of Mel Ferrer for the role?

A. In my opinion, he was not ideal casting. I believe he could have played it, but I couldn't have the enthusiasm for it that others had, and I couldn't honestly press her to take him.

Q. Was this first conversation with reference to the replacement before or after you had heard of the possibility of Franchot Tone playing the role?

A. I believe that the discussions about Ferrer and Ryan preceded any discussion of Tone.

Q. And I understood you to say that you first heard about Tone when Mr. Sparks told you on the lot——

A. That is right.

Q. ——that Ann Sheridan had asked for Tone, is that right? [430]

A. That is the impression I have.

Q. Were you in court when Mr. Sparks testified?

A. I was.

Q. Do you recall his testifying that he first mentioned the name of Franchot Tone?

A. I heard him say that.

Q. Is it possible that he told you that he suggested the name to Ann Sheridan and she had approved?

A. It is possible. But I am under the impression that he told me that Miss Sheridan had run into him on the lot and suggested him.

Q. I also understood you to say that he was not enthusiastic about Mr. Tone?

(Testimony of Sid Rogell.)

A. I believe that we were both in accord that wasn't ideal casting.

Q. But you did submit it to Mr. Hughes?

A. I did.

Q. When you submitted it to him did you submit it with or without recommendation?

A. I believe without recommendation.

Q. What did Mr. Hughes do?

A. He negated the idea, he didn't think it was exciting casting and said so.

Q. Did he do so before or after he talked to Mr. Depinet in New York? [431]

A. That I don't recall.

Q. Did you hear—

A. I don't think he checked Mr. Tone's name with Mr. Depinet in New York. I think he asked us to do that on one or two occasions.

Q. Did you check with Mr. Depinet on Mr. Tone?

A. I—either I checked with him or perhaps Mr. Youngman did. One of us were on the phone with Mr. Depinet in New York two or three times a week, and it would be something put down for the New York call. We got the answer back that Ann Sheridan supported by Franchot Tone and Melvyn Douglas would sound like a reissue or not very exciting casting, or at any rate, it would present, if not sales obstacles, nothing that would help them in selling the picture.

Q. Did you convey that information to Miss Sheridan?

(Testimony of Sid Rogell.)

A. It was conveyed to her either through me, Sparks, or someone.

Q. You had in your desk during your reign at RKO a little black book called the Audience Research Institute Book? A. Right.

Q. Do you recall an occasion with Miss Sheridan looking in the book to see what the respective box office ratings as shown by that book [432] were? A. I do.

Q. And it is a fact, isn't it, that Mr. Tone's rating was equivalent to Mr. Ryan's?

A. I think it was even higher.

Q. Even higher? A. Yes.

Q. Did you convey that information to Mr. Depinet or Mr. Hughes?

A. I did. But that to them wouldn't mean what it might to someone not in the industry.

Q. In other words, they weren't influenced by the A.R.I. report?

A. Influenced to an extent, but it is not a bible. May I ad lib for a moment.

Q. Please.

A. We are in a position of knowing when we put Robert Ryan into a part, even though the A.R.I. may give him a rating of 10, and maybe Tone 15, that we have four completed pictures with Ryan, one opposite Colbert, one opposite Fontaine, that are still unreleased, which by the time this picture is shown he will have a higher rating. Furthermore, we are using something belonging to RKO, enhancing his value by using him opposite

(Testimony of Sid Rogell.)

Sheridan. Therefore this book doesn't mean very much.

Q. From your point of view, and my question does not [433] indicate that it is a wrong point of view, from your point of view one of the factors that entered into your mind in casting this role was not the best man available, but the best man from the point of view of RKO; is that a fair statement?

A. I think he was the best man available, and certainly he was the best man from RKO's point of view.

I might say we wouldn't miscast it in order to help the corporate values.

Q. All other things being equal, you would give the preference to the man who was under contract to RKO, is that right? A. By all means.

Q. And all other things being equal, as between Robert Ryan and Robert Mitchum, both of whom were under contract to RKO, you would rather put Mr. Ryan in to build him up in a picture that Miss Sheridan starred in? A. That's right.

Q. You said Mr. Ryan at that time was a less important man than Mr. Mitchum?

A. We consider him less important at the box office.

Q. You did not attempt to segregate these various discussions between the first third of July and the 16th of August in your direct, and I assume that was because you find it difficult to do so in your own opinion, is that right? [434]

(Testimony of Sid Rogell.)

A. I will try, if you guide me. I didn't find that I had any occasion to.

Q. I will if it will help. I only asked that so if possible I would like to have you try to break it down to specific dates and meetings.

I would like to know roughly when the name of John Lund was in the picture the first time. In other words, after or before Ryan and Ferrer were suggested?

A. After Ryan and Ferrer were suggested, and after Miss Sheridan suggested Tone, we started to exchange names with each other.

Q. Now, you did not say, so I will ask you. When you asked about the availability of Tone, had you been informed that Miss Sheridan approved him?

A. That Miss Sheridan had approved Tone?

Q. Lund. If I said "Tone" I meant "Lund."

A. Perhaps I didn't hear you right. When I suggested Lund to Miss Sheridan I got the impression she didn't know John Lund. He is quite new, or was at that time, and she had been in Europe, and she didn't give it very much consideration. I thought it was a good enough suggestion that I asked Mr. Schuessler in our casting office to ascertain Mr. Lund's availability.

I believe later on and before our negotiations had terminated, that Miss Sheridan did learn more about Mr. Lund [435] and would have considered him favorably, had it been possible.

I think at that time he was unavailable.

(Testimony of Sid Rogell.)

Q. Do you remember that Paramount turned the part down because of the script?

A. I believe that was the case.

Q. Did you tell that to Miss Sheridan? If you remember.

A. I don't remember. I really don't.

Q. Do you remember the name of Wendell Corey in the discussions? A. Yes.

Q. Who suggested Wendell Corey?

A. I don't recall.

Q. Do you recall whether or not anything happened with reference to Wendell Corey?

A. I just remember his name being in this maze of names, and what happened with him I don't recall. We wouldn't be very excited by Wendell Corey.

Q. Have you any recollection about Richard Conte?

A. I believe to the best of my recollection that Miss Sheridan suggested Richard Conte.

Q. Do you remember what you did?

A. I didn't think he was very important casting. I didn't think he was important enough to take up with Mr. Hughes until we ascertained his availability. By that I mean [436] I didn't want Mr. Hughes to say, "Yes," and then go and find out from Twentieth Century-Fox, to whom he was contracted, that he wasn't available. So I asked Mr. Schuessler to ascertain his availability. Mr. Schuessler, I believe, found out that Twentieth-Century-Fox wouldn't even tell you whether or not he was available until they read the script.

(Testimony of Sid Rogell.)

By that time I believe our interest in Mr. Conte was so ephemeral that we didn't even want to go to the trouble of sending them a script, because once you send them a script you have in effect said, "We want your man," and then you come back and say to Mr. Zanuck, "We don't know whether we want him to play the part or not," and you have created a bad piece of public relations. So we didn't send the script.

Q. You are now referring to Richard Conte?

A. Yes.

Q. Plaintiff's Exhibit 20, you were in court when this was introduced, in which the note was read, "Send script when S. R. gets H. H. approval," that is the script you are referring to?

A. I wasn't here when that was read, but that sounds all right.

Q. I thought you heard it.

A. I wasn't here when this was read.

Q. I will show it to you. [437]

You have looked at Plaintiff's Exhibit 20, and does that refresh your recollection of a discussion with Mr. Schuessler about the request of Fox for a script in connection with Richard Conte.

A. Yes.

Q. Now, with your recollection refreshed, did you talk to Mr. H. H. about getting his approval to send a script?

A. I don't recall. I may have. I don't recall, but it occurs—it seems to me that it developed that either Hughes or I, or both of us, were not enthu-

(Testimony of Sid Rogell.)

siastic enough about Conte to have sent the script over.

Q. Did you tell Mr. Hughes that Miss Sheridan had suggested him?

A. Yes, I am sure we did.

Q. Did Mr. Hughes know that she had indicated she would approve of John Lund?

A. I don't believe that I ever told Mr. Hughes that Miss Sheridan would accept John Lund. If I did, it came very late in our negotiations.

The Court: Mr. Hughes was the last word on these things, is that right?

The Witness: That's right.

The Court: You just told Mr. Hughes those things which you thought he ought to know?

The Witness: Well, I wouldn't want to sell him your [438] Honor, or try to persuade him to use somebody which the producer and director and I all thought was wrong, bad casting, or for whatever reason. I believe we did inform him——

The Court: If Mr. Hughes said, "This is it," it didn't make any difference what the directors or the producers or the executive producers or the casting director or anybody else thought, if Mr. Hughes said, "This is it," that went?

The Witness: That is pretty much the truth.

Q. (By Mr. Gang): Directing your attention again to the period of time when the name of Franchot Tone was the subject of discussion, do you remember talking to Mr. Tone's agent?

A. Yes, I do.

(Testimony of Sid Rogell.)

Q. From what I gather, Mr. Goldstone was his agent also? A. No. This was Mike Levee.

Q. Another agent was the agent for Mr. Tone. And you talked to Mr. Levee, did you not?

A. I did.

Q. And this was sometime towards the end of July, 1949?

A. This was within a few days after the refusal on the part of Robert Young.

Q. Sometime in July? A. Yes. [439]

Q. And was the subject of the discussion with Mr. Tone's agent the amount of money that he would want to play the part?

A. I remember that vaguely. I know it is specific in here——

Q. I haven't referred to that, Mr. Rogell, because your recollection has been pretty good.

A. I think Mr. Tone's salary at the time was \$50,000 per picture, is that correct?

Q. I don't remember. I only want to see if you remember. A. I don't, frankly.

Q. You do remember a discussion about the amount of money that Mr. Tone would want if he played the part?

A. Yes. They were quite anxious for him to play the part.

Q. And this discussion took place before the turn-down by Mr. Hughes, is that right?

A. That's right.

Q. You have referred to the fact that your deposition was taken in December of '49. Do you re-

(Testimony of Sid Rogell.)

member at that time having a memorandum before you in which you had a notation dated August 2nd, 1949, about Mr. Ryan for Ann Sheridan, do you remember that? If you don't, if you will look at page 48, line 3, to refresh your recollection. [440]

A. Yes, I do remember.

Q. Does that refresh your recollection now, having that note before you, as to what brought the name of Bob Ryan back into the discussion on the 2nd of August?

A. So far as I can remember, Bob Ryan's name was in here, in these negotiations, and every discussion with Miss Sheridan at every meeting from the time that we learned that Robert Young was not going to perform, I don't think that we ever had a meeting that we didn't try to persuade her to favorably consider Robert Ryan.

Q. Do you remember a notation of August 8, 1948, about Mel Ferrer? That is on page 50, line 23, Mr. Rogell.

A. Yes, I did discuss Mel Ferrer with Miss Sheridan.

Q. Now, those dates, do they reflect discussions over the telephone with Mr. Hughes?

A. Yes, they do.

Q. And it is a fact, as you have stated, that in this particular case "Carriage Entrance," the decisions were being made by Mr. Hughes and not by you or Mr. Sparks?

A. These decisions in which we are all interested here were all being made by Mr. Hughes.

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(Testimony of Sid Rogell.)

Q. Your next note was August 11, 1949, Richard Basehart. Can you remember what that discussion was with Mr. Hughes about the possibility of Mr. Basehart playing the role? [441]

A. Is that mentioned here?

Q. Yes. That is on page 52, line 19, if you want to look at it to refresh your recollection?

A. I recall mentioning Richard Basehart to her.

Q. You don't have any other recollection at this time about that discussion either with Miss Sheridan or Mr. Hughes about Basehart?

A. Well, these routine meetings were going on back and forth, and there was nothing particular except that on each occasion a new name would be introduced and discussion had about it.

Q. There was a note with no date on it, which is referred to on page 53, line 15, "Sheridan-John Conte-11"; you meant Richard Conte, did you not, Mr. Rogell?

A. No, I have never met him in my life.

Q. Did you mean Richard Conte?

A. Did I mean him?

Q. Yes.

A. I thought you said did I meet him.

Q. Was that a misstatement on your part, or did the reporter get the wrong name?

A. No, that was the right name.

Q. John Conte?

A. It must have been Richard Conte, I beg your pardon. John Conte is a radio actor, I believe. I probably said John [442] Conte.

(Testimony of Sid Rogell.)

Q. The memorandum is sometime on or after August 11th, is it not?

A. It says August 11th exactly, on line 8, page 53.

Q. So that or about that date you did have under discussion the possibility of Richard Conte playing that role?

A. It was at this time that Miss Sheridan came to us presumably, if my memory serves me, and asked us to consider Richard Conte. I believe this was her suggestion and not ours. I am not sure.

Q. And the 11, if you remember, stood for what?

A. Meaning that was his rating in that particular book.

Q. A.R.I. book? A. A.R.I. book, yes.

Q. You said on direct examination that sometime shortly prior to August 15th, 1949, which was a Monday, you received a call from Mr. Hickox in which he stated that Miss Sheridan would like very much to speak to Howard. You meant Howard Hughes? A. Correct.

Q. Did she say why she wanted to speak to Mr. Hughes?

A. The inference was pretty plain.

Q. Did he say? [443]

A. I don't think he said. He said, "Ann would like to have you arrange for her to see Howard."

Q. If I heard you correctly you said, believe it or not, you made the date that afternoon, which was Monday? A. That is correct.

(Testimony of Sid Rogell.)

Q. Was it a fair inference on my part that it was difficult to make dates to see Mr. Hughes?

A. Quite difficult.

Q. And, as you said before, you had to make a date to see him elsewhere other than the RKO lot?

A. Right.

Q. In this instance you had to go to the Samuel Goldwyn Studios where he had a private office?

A. That is where he maintains his own office.

Q. And you told Mr. Hickox to meet you there with Miss Sheridan?

A. Right.

Q. Late that afternoon you did meet there, is that right?

A. Right.

Q. And how did you get into the lot? Did you drive?

A. I drove in the automobile gate and instructed them to do likewise. I waited for them, and then they followed my car in to the back door to Mr. Hughes' office, which is a little hard to find. [444]

Q. And you went to the back door of Mr. Hughes' office?

A. That is the normal way of entering his office. It is a little easier when you have driven on the lot.

Q. Was there any signal which admitted you, Mr. Rogell?

A. Just knocked on the door.

Q. Who opened the door?

A. Mr. Hughes.

Q. Was anybody there at the time besides Mr. Hughes?

A. Not to my knowledge.

(Testimony of Sid Rogell.)

Q. And the three of you went into the office?

A. We did.

Q. Did you relate your entire recollection of the conversation on direct examination to the best of your ability?

A. Except things which I thought were irrelevant.

Q. Would you say that when Mr. Hughes greeted Miss Sheridan it indicated that they had known each other for some time?

A. I thought they had known each other.

Q. Did they call each other by their first names?

A. Yes.

Q. Did Mr. Hughes make any remark about war paint on Miss Sheridan? [445]

A. I didn't recall that, but I don't deny it. It sounds like Howard.

Q. Do you remember Miss Sheridan saying she didn't come to have any quarrel, she came to get him to give her a leading man for the picture?

A. I do.

Q. And the subject of the entire meeting was Miss Sheridan's plea to Mr. Hughes to get a leading man so the picture could go forward, that was the subject of the discussion?

A. Yes, that is what we were there for.

Q. Do you remember the names of various leading men that were mentioned by Miss Sheridan in that meeting?

A. To the best of my recollection Miss Sheridan at that meeting indicated that she had consid-

(Testimony of Sid Rogell.)

ered everybody that we had recommended and she would still like to have Franchot Tone play the lead in the picture.

Q. Did she say that she also approved John Lund? A. I don't recall that.

Q. Did she mention Richard Conte?

A. She very well may have, it is quite possible.

Q. In particular did she say, "Howard, why don't you give me Bob Mitchum?"

A. It is quite possible that she did. I don't remember. [446]

Q. And if she did, Mr. Hughes said no?

A. If she did Mr. Hughes must have said, "He is not available."

Q. I think you said that Mr. Hughes asked Miss Sheridan as a favor to him to look at some more film on Ryan, Ferrer, and Preston, to see if she wouldn't change her mind about their suitability?

A. That is correct.

Q. Did he say anything about how cooperative she had been? A. I don't recall.

Q. Did he say——

A. But may I interject one thing? Mr. Hughes speaks in a very inaudible tone of voice; he is very hard of hearing, and when you meet him you have to practically get in his lap, and what he was saying to Ann I couldn't hear three feet away. So some of these things I couldn't hear, honestly.

Q. You could notice their attitudes, however?

A. Yes, it was all very friendly.

Q. When the meeting broke up, it broke up

(Testimony of Sid Rogell.)

on a friendly note, did it not? A. Exactly.

Q. Mr. Hughes was not angry with Miss Sheridan and she wasn't angry with him? [447]

A. Not at all.

Q. And she said she would look at the film the next day, Tuesday? A. Right.

Q. And you have stated that you arranged for her to look at that film? A. Right.

Q. And you escorted Miss Sheridan to the projection room where film was run? A. Right.

Q. And on Tuesday afternoon you have stated she come back to your office after seeing the film?

A. Right.

Q. And told you that having looked at the film again her opinion still was that these people were not, in her opinion, suitable for that role, is that right? A. That's right.

Q. Now, I would like you, if you can, to cast your mind back to that Tuesday afternoon, Mr. Rogell. It is quite clear in your mind that they came to your office right after looking at the film?

A. Right.

Q. Isn't it a fact that it was at that meeting that for the first time the name of Charles Boyer was mentioned, Tuesday afternoon, August 16, 1949, and didn't you mention it? [448]

A. I did mention it, but whether it was that meeting or not I don't recall. It seems to me it might have been—I know it was very late in our negotiations. If it wasn't that meeting, it was certainly one of our very late meetings.

(Testimony of Sid Rogell.)

Q. After having refreshed your recollection with reference to the meeting at Mr. Hughes' place, Boyer's name was not mentioned?

A. It wasn't mentioned at Hughes' office at all.

Q. And it wasn't mentioned in your office on Tuesday, August 16th?

A. That I don't recall. It very well may have been.

Q. Do you remember calling Mr. Schuessler to come to your office?

A. On that particular day?

Q. Yes, Tuesday, August 16th.

A. I am sure that I did, but I don't remember it. Schuessler has testified that I did.

Q. May I suggest to you that he came and told you that Mr. Boyer was available, or that he might be available, and that you at that time told him to check and see if he was available, is that right?

A. I believe it is, yes.

Q. Also, on that occasion you discussed whether or not he would play this part which had been turned down by so many people; that is possible that you did discuss that? [449]

A. Yes, very possible.

Q. And somebody said—whether it was you, or Mr. Schuessler, or Miss Sheridan—that as long as he got the girl he would take the part?

A. I heard that here in the court room, but I didn't hear it before.

Q. You don't remember now that it was said on that occasion?

A. No. But I believe that is possibly true.

(Testimony of Sid Rogell.)

Q. You mean that the statement was made, or that the statement was true?

A. I believe at that time Mr. Boyer might have been had, because his career has been beset with many problems for the last couple of years. I believe we could have had him had we tried.

Q. When Miss Sheridan left the room she had indicated to you that Boyer would be agreeable to her?

A. When Boyer's name was mentioned on this occasion, if it was this occasion, Miss Sheridan did not say no. She thought that the suggestion had merit and indicated that she would consider him, and we should go further in ascertaining availability, et cetera.

Q. For the purpose of refreshing your recollection only, will you look at page 97 of your deposition, line 5, Mr. Rogell? [450] A. Right.

Q. At line 5, we were looking at your memorandum dated August 16, 1949. You will notice in line 13 you said there was a question mark opposite Charles Boyer's name? A. Yes.

Q. Does that refresh your recollection that the question mark was put there on that date by you as a possibility that he might be available?

A. Well, just as it says here, evidently I had discussed Boyer with Hughes, and he said, "If you want to, ask Ned," meaning check on this suggestion with Mr. Depinet. So, presumably, if I may continue, we discussed Boyer before this memorable day of August 16th.

(Testimony of Sid Rogell.)

Q. The memorandum is dated August 16th, is that right?

A. Yes, but I would have had to have talked about——

Q. Is it possible that memorandum was made after you talked to Miss Sheridan and indicated a discussion with her?

A. I guess it is. They are so vague I wouldn't like to say that it isn't possible.

Q. On that same date, August 16th, if you will look at the bottom of page 97 for the purpose of refreshing your recollection. You don't have those notes with you, by any chance, do you [451]

A. No, I don't.

Q. Under date of August 16th, that's true, you have a note which reads, "Our Legal Department tells me that if we do not make a deal because we can't get her to approve a leading man that we are under no obligation to her, that this is our opinion." Do you remember writing that note down?

A. Yes.

Q. Was that after Miss Sheridan had left your room on the 16th of August, Tuesday?

A. Right.

Q. When did you consult your Legal Department to get such an opinion? Before or after Miss Sheridan got there?

A. After Miss Sheridan left my office she went to Mr. Youngman's office.

Q. Who told you she went to Mr. Youngman's office?

(Testimony of Sid Rogell.)

A. Mr. Youngman and others, but certainly Mr. Youngman.

Q. It was that afternoon that you talked to your Legal Department, is that right?

A. That afternoon we had our regular Tuesday meeting when this matter, which was certainly important, was discussed at length. I said, "What position are we in?" And they gave me this kind of an opinion.

Mr. Gang: Thank you, Mr. Rogell.

The Court: Are you through with this witness, Mr. Knupp? [452]

Mr. Knupp: Just a few questions, if the court please.

Redirect Examination

By Mr. Knupp:

Q. Mr. Rogell, you were asked about this memorandum that you made on the 16th about instructions you had from your legal department. Do you recall whether or not that memo was made after you had talked with Mr. Youngman?

A. It was.

Q. And made after he had talked with Miss Sheridan and Mr. Hickox? A. Yes.

Q. And did he tell you the result of his conference with Miss Sheridan and Mr. Hickox?

A. He did.

Q. Before you wrote that memorandum did Mr. Youngman also tell you the result of certain conversations he had had with Mr. Banks?

(Testimony of Sid Rogell.)

Mr. Gang: If the court please, it probably is preliminary. I object to any conversations had outside the presence of the plaintiff, so we don't get into a wrangle.

Mr. Knupp: I want to show, if the court please, that counsel has apparently attempted to leave the impression that this memorandum was made as soon as Miss Sheridan left his office. I think I am entitled to show, in view of that circumstance, certain intervening happenings and certain [453] information.

The Court: You can show events or happenings, but that is different from asking for the conversation.

Read the question, Mr. Reporter.

(The last question was read by the reporter.)

The Court: You may answer that yes or no. Did Mr. Youngman make a report to you on certain conversations he had had, without telling us what the conversations were, did he or did he not?

The Witness: Yes, he did.

The Court: The record should show that I overruled your objection made to that particular question.

Q. (By Mr. Knupp): Mr. Rogell, in this meeting with Mr. Hughes did Miss Sheridan indicate, as far as you now recall, that she would approve anybody for this role except Franchot Tone?

A. No, but she was very friendly and certainly cooperative, agreed willingly to look at this film.

Q. Did Mr. Hughes tell her at that time that

(Testimony of Sid Rogell.)

the studio had invested a large sum of money in this film and ask her if she wouldn't as a favor to the studio look at this film of Ryan and Ferrer again? A. He did.

Q. And see if she couldn't change her opinion with respect to them and approve one of them as the leading man [454] in this role?

A. He did.

Q. At the time the meeting broke up Miss Sheridan agreed she would go down to look at the film to see whether or not she could comply with Mr. Hughes' request? A. That is correct.

Q. When she came back to your office on the 16th after looking at the film, what did she say to you with respect to the matter of approving either Mr. Ryan or Mr. Ferrer?

A. She said she still didn't like Ryan, that Ferrer wouldn't do. And there was another film involved. Shall I mention that?

Q. Preston?

A. I said, "What about Preston?" And she said, "I didn't even bother to look at that. He is not right for it."

Mr. Knupp: That is all.

Mr. Gang: No further questions.

The Court: Just a minute. I would like to ask a question or two, and counsel may object to my questions, and I am liable to sustain an objection to my own question.

Mr. Knupp: I won't object to it unless I think the court will sustain the objection.

(Testimony of Sid Rogell.)

The Court: Facetiously, there is the old story of the judge asking the questions, and the lawyer inquired, "Your [455] Honor, are you asking this question for my benefit or for the benefit of my opponent. If you are asking it for my opponent's benefit, I object, and if you are asking it for my benefit, I withdraw the question."

As I understand it, Mr. Rogell, Young originally bowed out of this picture because the script had been modified after he had originally looked over either the novel or the first script?

The Witness: That is correct.

The Court: And he apparently felt that the part had been cut down in size or stature, is that right?

The Witness: That is what he said.

The Court: Now, subsequently your script was rewritten several times to again build the part up, is that right?

The Witness: That's right.

The Court: Did you ever go back to Young and say, "Look, you originally were interested in this picture, we have now rebuilt the part, it is a bigger part than it used to be, will you look at it again and see if we can't go back to where we were at the time we bought this package deal"?

The Witness: I didn't, your Honor, but efforts were made through Sparks, and I believe Banks, to contact Bob Young and to sell him or try to get him to reconsider his turning the role down, to find out what it was he objected to, presumably

(Testimony of Sid Rogell.)

to try to correct something, do anything [456] within reason to please him and yet not distort the picture. We were never able to effect such a meeting.

The Court: This is something that you didn't do yourself?

The Witness: No, I didn't.

The Court: But you had reports from your subordinates that attempts had been made?

The Witness: That is correct. Frankly, if I may continue, we never realized that this would be so important or we certainly would have pressed harder to get Mr. Young into the picture.

The Court: Well, around the 17th of August it began to appear pretty important to you, didn't it?

The Witness: It did. But it never occurred to us to go back and get Young into the picture.

The Court: On or about the 16th of August was your last conversation with Miss Sheridan?

The Witness: That's right.

The Court: Did you or any other executive of RKO at that time say to her, "Well, now, Miss Sheridan"—in substance—"we have come to the end of the rope, we are going to propose a certain actor for this picture, and you take that actor or leave it and we are at the end of our negotiations," was anything said that would indicate to her that you were at the end of your negotiations and [457] that the following day you were going to terminate her contract?

(Testimony of Sid Rogell.)

The Witness: Not to my knowledge.

The Court: At all times in the dealings you had with Miss Sheridan you had in mind, did you not, that under this contract that then had been entered into between Miss Sheridan and RKO, that there had to be eventually a meeting of the minds on this male lead—did you have that in mind?

The Witness: As a matter of fact, her contract gave her approval of the leading man, and we entered into it because we had both immediately approved Robert Young. And then when Robert Young failed to perform we were both sort of up in the air as far as our legal rights were concerned, because before the paper was signed we had already approved and met that problem. Here we are with everything else ready to go, she had the approval of the leading man, and presumably we have the right to approve, as well.

The Court: In other words, to your mind it was a situation where the minds had to meet?

The Witness: Yes, that's right. And I really thought we could get together.

The Court: I have no further questions.

Mr. Knupp: May I ask one question?

The Court: Yes, you may.

Q. (By Mr. Knupp): Mr. Rogell, when you say you understood that there [458] had to be a meeting of the minds, you mean that you understood that Miss Sheridan had to approve of your selection of a leading man before she was bound to perform her part, was that your understanding of the contract?

(Testimony of Sid Rogell.)

A. My understanding of the contract is that she had certain basic agreements or approvals, one of which was leading man, another was director, et cetera.

Q. But so far as the actual selection of the leading man was concerned, you didn't understand that you had to secure a leading man that she suggested?

A. No, no, I didn't think that. I thought she would have to select one out of several that might be——

Q. Proposed by you?

A. Proposed by the studio.

Mr. Knupp: That is all. I have no further questions.

Mr. Gang: No questions.

The Court: Step down, Mr. Rogell.

May the witness be excused, or do you want him around?

Mr. Knupp: I think he may be excused, if the court please.

The Court: Well, we didn't get very far today, did we? How many more witnesses do you have?

Mr. Knupp: We have three or four, but their testimony will be very brief. I think so far as we are concerned we can be through by noon tomorrow. I hope so. [459]

Mr. Gang: My rebuttal will be very short indeed.

The Court: Is there any possibility that we get to the argument in the afternoon on this case?

Mr. Knupp: It depends, I think, to a consider-

able extent on how much time we spend with the court on the matter of instructions.

Mr. Gang: May I state that I had Mr. Rudin stay at the office and work on our instructions so we could be in a position to discuss them with you when your Honor was ready for it. It will save that much time.

Mr. Knupp: I think if it meets the court's convenience we certainly would have no difficulty in getting the matter in such shape so that it can be argued and submitted to the jury Monday afternoon, if that would meet the court's calendar.

The Court: I think we had better not try to hurry, make waste by trying to hurry too fast. We will have some time to spend on the instructions, and even if we succeeded in working that end of it out we would be instructing the jury late Friday at the very best.

I think we had better figure on closing up the evidence tomorrow and spending what time we need to on our end of it, and then have the jury back possibly Monday at 1:30 or 2:00, or Tuesday morning.

Mr. Gang: Whatever suits the court's convenience.

The Court: We will see tomorrow. [460]

Ladies and gentlemen of the jury, remember the admonition of the court not to form or express any opinion on this matter until it is finally submitted to you for your verdict, and you are not to communicate among yourselves or with anyone else on any matter touching the merits of this case. Keep

your mind open until the case is finally argued and until you are finally instructed as to the law and it is submitted to you for your decision.

You are excused until 10:00 o'clock tomorrow morning.

(Whereupon the jury retired from the court room.)

The Court: Anything further tonight?

Mr. Gang: No, your Honor.

Mr. Knupp: No, your Honor.

(Whereupon on Thursday, February 1, 1951, an adjournment was taken to Friday, February 2, 1951, at 10:00 o'clock a.m.) [461]

Friday, February 2, 1951, 10:00 A.M.

The Court: The record will show that the jurors are present and in their proper places.

Mr. Gang: So stipulated.

Mr. Knupp: Mr. Banks.

POLAN BANKS

called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

The Court: You have already been sworn, Mr. Banks.

The Witness: Yes, sir.

Direct Examination

By Mr. Knupp:

Q. Mr. Banks, did you have some discussions with Miss Sheridan with respect to who should be

(Testimony of Polan Banks.)

substituted for Robert Young in the leading role of this picture?

A. Yes, sir, but the discussions took place mostly in Mr. Sparks' office when we were discussing the actors that have been mentioned in court already.

Q. Did you have any discussions with her outside of Mr. Sparks' office?

A. I believe once or twice on the telephone we talked about it.

Q. Did you have any discussions with her about Franchot [463]Tone?

A. I frankly don't remember.

Q. You don't recall whether or not during any of your discussions outside of the presence of Mr. Sparks Miss Sheridan said anything to you about Franchot Tone or about his being substituted in this part?

A. To the best of my recollection I think she did say once or twice that she thought he would be good for the part if we couldn't get someone else.

Q. You were present, Mr. Banks, when certain film was shown to Miss Sheridan and Mr. Hickox?

A. Yes, sir.

Q. Particularly calling your attention to the date of August 16th, were you present on that occasion?

A. Yes, sir, I was.

Q. Do you recall what film was shown to Miss Sheridan and Mr. Hickox at that time?

A. To the best of my recollection right now I think we saw part of "The Macomber Affair" and we saw some more film on Ryan.

(Testimony of Polan Banks.)

Q. Anything in which Ferrer appeared?

A. Yes, something in which Ferrer appeared. I forget exactly what it was.

Q. Where did you see this film?

A. In projection room 2 of the studio. [464]

Q. Who was present when the film was being shown?

A. Just Miss Sheridan, Mr. Hickox, and myself.

Q. About how long were you in there?

A. To the best of my recollection, about 15 minutes, I figure, 10 or 15 minutes.

Q. So what part of any of these films you saw, and I think you mentioned only two, you saw within the period of 15 minutes?

A. About that. It may have been a little longer. Around that time.

Q. Was anybody else in the projection room as far as you can now recall except Miss Sheridan, Mr. Hickox and you? A. No, sir.

Q. Did you on that occasion have any discussion with Mr. Hickox?

A. Yes, as we were leaving the projection room Miss Sheridan walked ahead of us and went to the water cooler, I remember the projectionist stopped by to talk to her, and Mr. Hickox made some remark, I don't remember the exact wording, but he made a remark——

Mr. Gang: Just a moment. May I take the witness on voir dire, your Honor? I assume what you are going to say is a conversation with Mr. Hickox outside the hearing of Miss Sheridan.

(Testimony of Polan Banks.)

The Witness: Yes, it was. [465]

Mr. Gang: Therefore I ask the court for a ruling for him not to volunteer any testimony of any conversation outside the presence of the plaintiff.

Mr. Knupp: If the court please, our position in that respect is that it amply appears from the evidence here that Mr. Hickox was the representative, employee, of Miss Sheridan. She herself has testified that she introduced him at the studio as her business manager. She has testified that he was regularly in her employ at a fixed salary and had been for fourteen years, and that he accompanied her on all of these trips to the studio and took part in all of these discussions.

Mr. Youngman has already testified that when they came to his office on the afternoon of August 16th, Mr. Hickox did all of the talking with respect to what the situation was and what was going to be done about it.

Now, the law is clearly established, if the court please, that the declarations of an agent or representative of a party, even without the presence of the party, are admissible in evidence. That is the code rule, and that has been established by a long series of decisions.

Once the representative character of the party has been established his declaration or statements outside of the presence of the party are admissible in evidence. That is the code rule, and that is the effect of all of the decisions, [466] if the court please.

(Testimony of Polan Banks.)

It seems to me that it is very apparent here that Mr. Hickox was taking an active part in all of these negotiations on the part of Miss Sheridan, and under the law we are entitled to have his declarations or statements made in connection with a possible settlement of this controversy.

The Court: I have your point. I don't think it is going to do any good to argue further, Mr. Gang, but I am going to make a ruling that you won't like. If you want to be heard further I will let you be heard.

Mr. Gang: I don't think it is that important, but I want the record to be clear that the only evidence is that he was the business manager to take care of checks, insurance, and there is no evidence showing any authority on the part of Mr. Hickox to make any commitments, contractually or otherwise, for her, and on that ground I object to any conversation, and I let the matter rest there.

The Court: The objection will be overruled, because there has been sufficient foundation, evidence from which a jury might believe, if they so desired, that Hickox had the capacity that Mr. Knupp contends for. On the other hand, the evidence is in such state that a jury might find otherwise. They might find that this man had no authority to bind Miss Sheridan. The question before me is whether there is enough evidence in the way of foundation to let this statement in, [467] and I am merely holding that there is enough evidence shown from which a jury might believe that this man was an agent who

(Testimony of Polan Banks.)

was authorized to act for Miss Sheridan in all these matters, in which event you could give what credence you wanted to to his statement.

I am not deciding, however, that you must so find. You may find that his capacity as a business agent was such that he had no authority to bind her in any way with any of these statements, in which event you may reject the proffered testimony.

Do I make myself clear?

So my ruling only consists of the fact that a sufficient foundation has been laid to let this bit of evidence into the record.

A Juror: It is a question of scope of his authority?

The Court: Yes, that is the question you are going to have to decide, the scope of his authority. You have heard the evidence.

The Juror: Yes.

Mr. Knupp: What is the question?

(The record was read by the reporter as follows:

“Q. Did you on that occasion have any discussion with Mr. Hickox?

“A. Yes, as we were leaving the projection room Miss Sheridan walked ahead of us and went to the water cooler, [468] I remember the projectionist stopped by to talk to her, and Mr. Hickox made some remark, I don’t remember the exact wording, but he made a remark——”)

The Court: The objection will be overruled. Go ahead and complete it.

(Testimony of Polan Banks.)

The Witness: To the best of my recollection the remark he made was something to the effect that it looked as if we had reached a deadlock, as if the picture might never be made, and he asked if I thought it was possible that the studio might want to get someone else in place of Miss Sheridan, and if they did would it be likely that they would be willing to pay her \$50,000 to bow out of the contract. And I said as far as I would imagine I didn't think they would.

That was the end of the discussion on that.

Q. (By Mr. Knupp): Did you after that discussion with Mr. Hickox have some conversation with Mr. Youngman?

Mr. Gang: Just a moment. I object on the ground it is calling for hearsay, immaterial and irrelevant, incompetent so far as the plaintiff is concerned.

Mr. Knupp: My position, if I may state it to the court, in that respect is that subsequent to the time that this conversation which the witness has just testified occurred the action which the studio took in terminating the contract was taken that same day, and—I don't know, I could make [469] my point outside the presence of the jury if the court thought it was advisable. I don't want to prejudice the plaintiff in any way by a statement here that the court might rule to be incompetent.

The Court: I will hear you at the bench. I don't see now how it could be competent.

(Testimony of Polan Banks.)

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Knupp: My point on that situation is that after this conversation between this witness and Mr. Hickox that the witness talked to Mr. Youngman and told him of this conversation, and that that is material because it is made to appear now, apparently made to appear, that without any further statement to Mr. Youngman the termination of the contract was decided upon. I think we are entitled to show the basis upon which the studio proceeded and the information it had at the time that it proceeded in order that the jury may know what the situation was that induced this notice of termination.

If that doesn't go into the record, then the jury is left with a completely false impression with respect to just what the situation was so far as what those in authority at the studio knew concerning Miss Sheridan's refusal to perform. It seems to me that it is a vital issue in the case because of the fact—— [470]

The Court: What you propose to ask is the conversation between Banks and Youngman?

Mr. Knupp: I propose to ask this witness whether or not he conveyed the information he secured in this conversation to Mr. Youngman.

The Court: If you ask just that one question, what he did, "Did you pass on to Youngman what you heard from Hickox?" I think that is proper.

Mr. Gang: I am still objecting.

(Testimony of Polan Banks.)

The Court: But if you ask for the conversation, that is out. It is one of those strange situations, Mr. Gang, that although it sounds like hearsay, actually what a man is doing is asking as to an act.

Mr. Gang: I have authority from the Ninth Circuit in the case of *Lester Cole v. Loew's Incorporated*, in which the very same problem came up with reference to what motivated the defendant in discharging Cole, and the Ninth Circuit said, and I quote:

“We think that the manner in which appellant”——

That is Loew's Incorporated, the employer.

“came to be persuaded to take the action which it obviously did is wholly without hearing on the case. As respects the action taken, and the right to take it, such matters are as irrelevant as would be a transcript of the debates in its director's [471] meetings.”

That language is the law.

Insofar as we are concerned in this case, all that the jury has to know is that we were fired, and the record is clear as to what happened. What motivated them, whether they wanted to save money, whether they thought it would be a better picture, whether they didn't like Miss Sheridan, that is of no importance whatever, because all we are concerned with is what did they do.

I say, again——

The Court: But you have a situation where the mental state, you admit, is an issue.

(Testimony of Polan Banks.)

Mr. Gang: Not in the way you have limited the damages. The issue of good faith only came in if we could get to the jury to find out that paragraph 29 with reference to minimum compensation was out of the contract, in which the question of good faith would be relevant so that the jury could then give us \$150,000 and 10 per cent.

The Court: Good faith is still in the case.

Mr. Gang: Not insofar as this point is concerned, your Honor.

The Court: I see what you mean. Good faith is in it only insofar as the acts of the parties in trying to get together on a leading man.

Mr. Gang: That's right. That is our position. [472]

Mr. Knupp: That is the point we get to now, if the court please. I wouldn't attempt to introduce this conversation for the purpose of proving the truth of what Mr. Banks has testified to, but I think on this issue of good faith if we leave this thing in the air where a jury is going to find that Youngman before he decided on terminating this contract knew nothing excepting what they had told him, that we haven't given the story to the jury.

The Court: I will permit you to inquire as to whether this information was passed on, but not as to the conversation itself.

Mr. Gang: The objection is in the record. Need I object again?

The Court: No, it is in the record.

(Whereupon the proceedings were resumed within the hearing of the jury as follows:)

Mr. Knupp: What was the last question?

(The question referred to was read by the reporter as follows: "Did you after that discussion with Mr. Hickox have some conversation with Mr. Youngman?")

The Witness: Yes, I did.

Q. (By Mr. Knupp): Did you convey to Mr. Youngman the conversation you had with respect to Mr. Hickox? A. Yes, I did.

Mr. Knupp: I think that is all. [473]

Mr. Gang: No questions, Mr. Banks.

Mr. Knupp: Mr. Youngman.

GORDON E. YOUNGMAN

called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

The Clerk: You have been sworn.

The Witness: Yes, sir.

Direct Examination

By Mr. Knupp:

Q. Mr. Youngman, what, exactly, was your position at the studio, RKO?

A. Well, I was vice-president in charge of commitments and business administration. I had charge of the business aspects of the operation, but not

(Testimony of Gordon E. Youngman.)

anything to do with the talent aspects or so-called artistic aspects of the operation.

Q. You are an attorney-at-law yourself?

A. I am, yes, sir.

Q. And are you now connected with the defendant?

A. No, I am not.

Q. When did you sever your connection with them?

A. December 31, 1950.

Q. How long had you been with RKO in the capacity in which you have indicated? [474]

A. At what time? Do you mean when I severed my connection?

Q. I mean prior to the time—yes, how long had you been employed there at the time you severed your connection?

A. Nearly 21 years.

Q. And in what capacities had you acted for the defendant during that period of time?

A. I was assistant secretary and assistant general counsel from 1930 to 1941, I was vice-president and general counsel from 1941 to 1949, I was vice-president in charge of commitments from 1949 to the middle of 1950, and I was vice-president in charge of the studio from June, 1950 to December 31, 1950.

Q. Prior to August 16th had you had any conversations with anybody either representing the plaintiff or the defendant with respect to the casting of this picture?

A. No, sir, I hadn't had any conversations with anyone. I had heard Mr. Rogell discuss the casting a couple of times, but I hadn't discussed it with

(Testimony of Gordon E. Youngman.)

him. I had been in his presence when he did discuss it.

Q. Would the matter, Mr. Youngman, of the approval of the script by Mr. Robert Young be a matter that would be in your jurisdiction?

A. No, sir.

Q. If Mr. Young had approved the script, is that a [475] matter which you would have information about?

A. I probably would have known about it, yes.

Q. To your knowledge did Mr. Young ever actually approve the basic screen play for this story, I mean approve it to the defendant RKO?

A. I don't know, Mr. Knupp.

Q. So far as you had any information there was never any formal approval by Mr. Young of the basic story?

A. I had no information of that fact. I just don't know.

Q. I show you, Mr. Youngman, a carbon copy of a letter which is unsigned and ask you if you can identify that letter.

A. Yes, I remember this letter being sent.

Q. And that letter is one which was written by you to Mr. Robert Young?

A. It was signed by me; it wasn't prepared by me.

Q. But it was signed by you in the regular course of your duties at the studio?

A. That's right; I used to sign all instruments going out of the studio.

(Testimony of Gordon E. Youngman.)

Mr. Knupp: I would like to have this marked, if the court please, as a defendant's exhibit.

The Clerk: In evidence?

The Court: That is the defendant's first exhibit, isn't [476] it?

The Clerk: Yes. This will be A.

The Court: Any objection?

Mr. Gang: No objection.

The Court: Received in evidence as Defendant's Exhibit A.

(The document referred to was marked Defendants' Exhibit A, and was received in evidence.)

Mr. Knupp: May I read this letter to the jury, if the court please? It is not very long.

The Court: You may.

Mr. Knupp: It is dated July 7, 1949, addressed to Mr. Robert Young, care of Nat Goldstone Agency, 9121 Sunset Boulevard, Los Angeles 46, California.

"Dear Mr. Young:

"Enclosed herewith is a 146-page screen play entitled "Carriage Entrance," which screen play was written by Marion Parsonnet based on the novel "Carriage Entrance" by Polan Banks, and which screen play is indicated as being a 'budget script' and which is dated July 7, 1949.

"We are submitting this screen play to you for your approval as the basic story for the next Picture provided for in our employment

(Testimony of Gordon E. Youngman.)

agreement with you dated September 13, 1945. The [477] role proposed for you to play in connection with the enclosed screen play is that of 'Quentin Cushing.'

"Please note that the enclosed screen play is designated as a 'budget script' and we, of course, reserve the right to change this script so long as we do not change the basic story.

"Kindly acknowledge the submission of this screen play for your approval as the basic story for the next Picture under the employment agreement by signing in the space indicated on the copy of this letter and returning such copy so acknowledged to us."

Q. (By Mr. Knupp): To your knowledge, Mr. Youngman, that was the first submission of a screen play by the studio to Mr. Young?

A. I think so.

Q. Did you receive a reply to that communication from Mr. Young?

A. I don't remember.

Q. I show you a letter dated July 11th addressed to RKO Pictures, Inc., Attention Gordon E. Youngman, and apparently signed by Robert Young through his agent Nat C. Goldstone; I ask you whether or not that letter was received [478] by you in the regular course of your duties in the studio?

Mr. Gang: I will so stipulate, Mr. Knupp.

Mr. Knupp: That is all. You don't need to answer the question.

(Testimony of Gordon E. Youngman.)

The Court: It is stipulated the letter was received.

Mr. Knupp: We ask that that be marked as Defendants' Exhibit next in order.

The Court: B received in evidence, Defendant's B. You may read it.

(The document referred to was marked Defendant's Exhibit B. and was received in evidence.)

Mr. Knupp: This letter, ladies and gentlemen of the jury, reads as follows:

It is dated July 11, 1949, RKO Radio Pictures, Inc., 780 Gower Street, Los Angeles 38, California.

"Gentlemen:

"Attention: Gordon E. Youngman.

"This will acknowledge receipt of your letter of July 7, 1949, together with which you submitted to me for approval the story entitled 'Carriage Entrance' as the proposed basic story for a picture under my employment agreement with you dated September 13, 1945.

"This is to notify you that I am hereby rejecting and disapproving of such submitted story [479] in conformity with the provisions of my employment agreement with you.

"Yours very truly,

"ROBERT YOUNG

"By NAT C. GOLDSTONE,
Agent."

(Testimony of Gordon E. Youngman.)

Q. (By Mr. Knupp): At the time this script was submitted to Mr. Young and this letter returned, did RKO have an employment contract with Mr. Young? A. Yes, it did.

Q. I show you, Mr. Youngman, a written agreement between RKO Radio Pictures and Robert Young, dated September 13, 1945, and ask you if that is the contract to which you refer.

A. Yes, sir, it is.

Mr. Knupp: If the court please, this contract is a very formidable document. There is really only one provision in the contract in which we are interested, and if Mr. Gang has no objection I have made an excerpt from the contract which covers paragraph 3 of the contract and which relates to the provision for approval or disapproval by Mr. Young of any basic story that may be submitted.

Mr. Gang: I have no objection whatever.

The Court: What you propose to use or read is paragraph 3, or whatever the paragraph is, rather than submit the whole document in evidence? [480]

Mr. Knupp: I beg your pardon?

The Court: You propose to use or to read this particular paragraph, rather than to offer the whole contract in evidence?

Mr. Knupp: Yes, if the court please. I think it would unnecessarily encumber the record.

The Court: You may do it either way you want to. You may offer it in evidence and then read it.

Mr. Knupp: I would like to offer it in evidence.

The Court: Defendant's Exhibit C will be the extract—of what paragraph, Mr. Knupp?

(Testimony of Gordon E. Youngman.)

Mr. Knupp: Paragraph 3.

The Court: Paragraph 3 of the contract between Robert Young and RKO.

(The document referred to was marked Defendant's Exhibit C, and was received in evidence.)

Mr. Knupp: I would like to read this provision of the contract so that they may know what we are talking about.

This provision is contained in the contract between the parties, and this provision relates to the right of approval or disapproval by Mr. Young of any basic story that is submitted to him. It is rather long, but I think it probably should be before the jury and reads as follows:

"Each of the pictures shall be based upon an approved basic story selected as herein [481] provided. The corporation will submit to the Artist one or more proposed basic stories for each picture. Such basic stories may be in the form of synopses, treatments, stories, books, plays or in any other literary form. Within five (5) days after the Corporation has submitted a basic story to the Artist, the Artist will notify the corporation in writing of his approval or disapproval of the proposed story. Failure to indicate approval or disapproval within said five (5) days shall constitute approval. The Artist agrees to exercise such right of approval reasonably and in good faith.

(Testimony of Gordon E. Youngman.)

“If the Artist disapproves of one (1) story the Corporation will, unless the Artist has previously approved a story for the Picture involved, submit a second story which shall be subject to the approval or disapproval of the Artist in the same way.

“If the Artist disapproves of two (2) stories submitted to him for his approval for a picture and has not approved a story for such picture, the Corporation at its election may either terminate the employment of the Artist [482] with respect to the Picture involved, or the Corporation may extend the current one (1) year period for such period as the Corporation elects, but for not more than six (6) months. Such election may be made by the Corporation by notice in writing to the Artist at any time before the expiration of such current one (1) year period, as the same may have previously been extended.”

There are additional provisions, if the court please, but I think the pertinent part of the paragraph with respect to approval or disapproval is included in what I have read to the jury.

Q. (By Mr. Knupp): Mr. Youngman, you had some conversation on August 16th in your office with Miss Sheridan and Mr. Hickox?

A. Yes.

Q. Is that the first conversation that you had with these parties or either of them with respect to this matter?

(Testimony of Gordon E. Youngman.)

A. No, I believe I talked to Mr. Hickox on the telephone one time before that about the extension of the time to commence the picture.

Q. But this is the first conversation you had had with respect to casting for the picture?

A. Yes. [483]

Q. And where did this conversation occur?

A. In my office.

Q. And who was present?

A. Mr. Hickox, Miss Sheridan, and me.

Q. Will you relate to the jury the conversation which then occurred indicating what was said as nearly as you can recall by each of the parties present?

A. Mr. Hickox told me that Miss Sheridan's contract had been taken over from Polan Banks when RKO made a deal with Polan Banks, and Robert Young had turned down the screen play, and Miss Sheridan was supposed to have approval of the leading man, that the studio had submitted Robert Young—Robert Ryan, Robert Preston, Mel Ferrer, and Richard Basehart, and Miss Sheridan did not approve any of them, it didn't look as if the picture was going to start and he would like to know what the studio's position was going to be. I said, well, I had nothing to do with casting pictures, and this was out of my line, but I would look into it.

Miss Sheridan said that she would approve Franchot Tone, and I believe she or Mr. Hickox said that Mr. Sparks had submitted Franchot Tone.

(Testimony of Gordon E. Youngman.)

And then one of them also said that Mr. Rogell was endeavoring to obtain Charles Boyer.

Q. Is that the substance of all the conversation you had at that time? [484]

A. Yes, Miss Sheridan said she had seen some film of some of these men and she didn't like them and couldn't approve them, and she wanted someone with a better name than most of them had, a better known name.

That's about all.

Q. Do you know whether or not that conversation occurred before or after the conversation which Miss Sheridan and Mr. Hickox had had with Mr. Rogell that same day? Did they indicate they had been in Mr. Rogell's office?

A. I don't recall that they did.

Q. Did you after that conversation—what did you do, Mr. Young?

A. I first telephoned Mr. Banks and asked him to come over to my office.

Q. Did he come? A. Yes.

Q. What happened then?

A. I asked him—

Mr. Gang: Just a moment. I think this is going somewhat beyond what we discussed at the bench, your Honor. I object to any conversation between the witness and Banks, both employees of the defendant, outside the presence of the plaintiff, as incompetent, irrelevant and immaterial.

The Court: We haven't gotten to that point yet.

(Testimony of Gordon E. Youngman.)

The question is did he come over to your [485] office.

Mr. Gang: I thought the question was "What happened then?"

The Court: What was the question?

(The last question was read by the reporter.)

The Court: Objection sustained to the question in that form.

Q. (By Mr. Knupp): I will ask you specifically, Mr. Young, did Mr. Banks relate to you a previous conversation that he said he had had with Mr. Hickox?

Mr. Gang: Same objection, your Honor.

The Court: Overruled.

A. Yes, he did.

Q. (By Mr. Knupp): And after that conversation with Mr. Banks what did you next do, Mr. Youngman? A. I telephoned Mr. Sparks.

Q. Did he tell you of his negotiations with Miss Sheridan?

A. I didn't ask him of his negotiations with Miss Sheridan; I asked him——

The Court: Now, wait. Answer that question yes or no.

The Witness: No, he did not.

Q. (By Mr. Knupp): You talked to Mr. Sparks about the situation? A. Yes.

Q. Did you talk with anybody else? [486]

A. Mr. Rogell.

Q. And all of these conversations occurred on the afternoon of August 16th? A. Yes, sir.

(Testimony of Gordon E. Youngman.)

Q. And the notice terminating the contract is dated August 17th; do you know when that letter was written and sent out, Mr. Youngman?

A. Yes, sir.

Q. When was that?

A. I would say between 4:00 and 5:00 o'clock on the afternoon of August 17th.

Q. That was all subsequent to these conversations that you had with employees of the studio to which you have just referred? A. Yes, sir.

Mr. Knupp: I think that is all, Mr. Youngman.

Cross-Examination

By Mr. Gang:

Q. In that letter from Mr. Young rejecting the script, you note that was signed by his agent?

A. Yes, by Mr. Goldstone.

Q. In your files have you ever found anything concerning Miss Sheridan's contract signed by Mr. Hickox, to your knowledge?

A. Not to my knowledge. [487]

Q. The answer is——?

A. Not to my knowledge.

Q. In the excerpt from Mr. Young's contract to RKO I heard the phrase that his right was to be exercised reasonably and in good faith, and that you had the opportunity to present a second story to him, is that right?

A. I don't recall the exact language of it. I think that is what Mr. Knupp read, yes.

(Testimony of Gordon E. Youngman.)

Q. In other words, there was some second chance provided for?

A. I believe so, Mr. Gang. I can't swear to it.

Q. You don't remember? A. No.

Q. You said you didn't know whether Miss Sheridan and Mr. Hickox had seen Mr. Rogell before they came to your office on the 16th of August in the afternoon, is that right?

A. I don't recall whether they said they had or whether they hadn't. The first thing that I remember is my secretary announced they were outside and wanted to see me.

Q. Isn't it a fact that when the name Charles Boyer was mentioned Miss Sheridan had said that they had talked to Mr. Rogell earlier that afternoon and he had suggested Mr. Charles Boyer?

A. You are right, you are right. At the end of the conversation she said he was trying to get Mr. Boyer. [488]

Q. And you said on direct examination this morning that either Mr. Hickox or Miss Sheridan asked you under the existing circumstances which had been related to you what was the studio's position going to be? A. Yes.

Q. Now, that came after a rather lengthy recital of what had transpired prior thereto, is that right?

A. That's right.

Q. Did either Miss Sheridan or Mr. Hickox say that they had been working on the lot off and on since July 6th?

A. I don't recall that statement.

(Testimony of Gordon E. Youngman.)

Q. Did she tell you of the many conferences and discussions that had been had by her with reference to a substitute for Mr. Young after he bowed out?

A. Mr. Hickox said that there had been a number of conferences.

Q. And did either Mr. Hickox or Miss Sheridan tell you that she approved John Lund?

A. No, I don't recall the name of John Lund being mentioned.

Q. Would you say that no mention was made of the fact that she had approved John Lund?

A. I certainly don't remember Mr. Lund's name being mentioned at any time during the conversation.

Q. How about Richard Conte? [489]

A. I don't remember that being mentioned.

Q. How about Franchot Tone?

A. Yes.

Q. And you do remember Boyer?

A. Yes.

Q. And you do remember that at that time Miss Sheridan said nothing about not wanting to do the picture, is that right?

A. That's right.

Q. In other words, she came to you, as you said when I examined you under Section 43 (b)—that they came to ask your help in getting the picture made, is that right?

A. Yes, sir.

Mr. Knupp: Mr. Gang, if you have some reference to his deposition I think in fairness to the witness he should be shown it.

(Testimony of Gordon E. Youngman.)

Mr. Gang: If there is any question in your mind about what you said I will be glad to let you correct it. I understood that is what you said.

The Witness: That's right.

Q. (By Mr. Gang): And the question from either Mr. Hickox or Miss Sheridan as to what the studio was going to do had to do with having the picture made, was it not?

A. I couldn't answer what was in his mind.

Q. What did he say at that time? [490]

A. He said, "What is the studio's position going to be?"

Q. And neither he or Miss Sheridan said that they wanted to be released from the commitment?

A. No. They said it looked like the picture wasn't going to start.

Q. Did they tell you why it looked that way?

A. Yes.

Q. On account of the fact there was no leading man to replace Robert Young as of that time?

A. That's right, the parties hadn't agreed as to a leading man.

Mr. Gang: That is all, Mr. Youngman.

Mr. Knupp: That is all, Mr. Youngman.

The Court: Step down.

Mr. Knupp: Mr. Schuessler.

FRED E. SCHUESSLER

called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

The Clerk: Mr. Schuessler, you have also been sworn.

Direct Examination

By Mr. Knupp:

Q. Mr. Schuessler, I think you have testified that you were casting director at RKO? [491]

A. Yes, sir.

Q. And you had occupied that position for two years?

A. Yes, sir. Well, it hadn't been two years at that particular time. It was two years the first of the year. I was asked by Mr. Gang how long I had been with RKO. It was two years I had been there altogether. When the picture started I had been with RKO probably—When was this picture made, in '49?

Q. These negotiations took place in '49.

A. Then I was there only about seven or eight months. I came there January 1, 1949.

Q. And you had been engaged in the motion picture business in the capacity of a casting director or in some capacity connected with casting for how long prior to that time? A. Since 1922.

Q. In that capacity what, generally, were your functions, Mr. Schuessler?

A. To make suggestions and recommendations for the parts after the scripts were received by our department.

(Testimony of Fred E. Schuessler.)

Q. Did you have any other duties to perform in that connection?

A. After the actors were decided upon then the deals were set through our office in all cases except the stars.

Q. And what did you do in an endeavor to determine [492] whether particular actors were available?

A. If the actor was under contract to a studio, we checked with that respective studio; if he was a free lance actor, we checked with his agent if he had one; if not, we would contact the actor direct.

Q. Can you tell me now, Mr. Schuessler, whether Robert Ryan was available at RKO for casting in this part of Mark Lucas in "Carriage Entrance"?

A. I think he was at that time, yes, sir.

Q. He was under contract to the studio at that time?

A. He was, but I wasn't sure whether he had finished his previous picture. I think he had finished it.

The Court: He had?

The Witness: Yes, he had finished it, yes, sir.

Q. (By Mr. Knupp): Were you familiar with the work of Mr. Ryan in motion pictures?

A. Very definitely.

Q. And what was your opinion as to whether or not Mr. Ryan would have been proper casting for this part?

A. I thought he would have been very fine in the part.

(Testimony of Fred E. Schuessler.)

Q. Do you know whether Mel Ferrer was available for this part?

A. He definitely was available.

Q. Were you familiar with the work of Mr. Ferrer?

A. Yes, sir, from the stage as well as his previous [493] picture.

Q. In what stage plays had Mr. Ferrer appeared?

A. That I wouldn't recall offhand.

Q. He had appeared on the stage, though?

A. Very definitely, yes, successfully, in New York.

Q. When did he come to RKO, do you know, approximately?

A. I wouldn't know the date, no, sir.

Q. Do you know what picture he had made at RKO?

A. "Bed of Roses" was the title of it at that time. I think it has been released under another name.

Q. Also a picture entitled "Lost Boundaries"?

A. That was made before he came to RKO. We signed him after he made "Lost Boundaries," back East.

Q. In your opinion was Mr. Ferrer proper casting for the part of Mark Lucas in this picture?

A. I thought he would have been very good in it.

Q. Are you familiar with the work of Robert Preston?

A. Yes, sir.

Q. Do you know what experience Mr. Preston had had in motion pictures, I mean generally?

(Testimony of Fred E. Schuessler.)

A. Yes, he has been successful in pictures for a number of years.

Q. And were you familiar with the pictures in which he had appeared? A. Yes, sir. [494]

Q. Did you feel that Robert Preston would have been proper casting in this picture?

A. Adequate. Not as good as Ryan or Ferrer by any means.

Q. And is the same true with respect to Richard Basehart? A. Yes, sir.

The Court: Which? What do you mean "Is the same true"? Adequate or excellent?

Q. (By Mr. Knupp): Adequate, but not as good as Ferrer or Ryan, is that what your answer attempted to indicate?

A. Yes, sir. That is the question you asked.

Q. Yes. Did RKO at this time have a contract with either Preston or Basehart?

A. No, sir.

Q. Do you know where Preston was employed?

A. He was free-lancing.

Q. What about Basehart?

A. Basehart was under contract to Eagle-Lion.

Q. Did you ascertain whether either of these two men, either or both of them, would have been available for casting in this part?

A. Yes, sir.

Q. What was the situation with respect to Van Heflin, insofar as being available for casting in the part? [495]

A. I checked with the Metro casting office to as-

(Testimony of Fred E. Schuessler.)

certain his availability, and their reply was that if I called a week or so later than my previous call they would be able to tell me whether or not he would be available. In other words, I assumed from that that they probably had something in mind for him down there and they weren't certain they were going to use him themselves.

Q. So at that time it wasn't definitely ascertained whether Van Heflin would have been available? A. No, sir.

Q. With reference to the other four you did ascertain they were available?

A. Very definitely.

Q. What was the situation with respect to Robert Mitchum, relating your answer to the early part of August, 1949?

A. Would you repeat that question, please?

Q. What was the situation with respect to the availability of Robert Mitchum in the early part of August, 1949?

A. So far as our department was concerned, he was never given any consideration because he was in the midst of a picture called "Holiday Affair."

Q. So far as you knew did the studio have any plans for future use of Mr. Mitchum at that time?

A. Not to my knowledge. [496]

Q. In your judgment as a casting director, and from your experience, Mr. Schuessler, as a casting director, what in your opinion would have been the best available casting for the part of Mark Lucas in "Carriage Entrance"?

(Testimony of Fred E. Schuessler.)

A. In my opinion it was a toss-up between Ryan and Ferrer. The ability of both men, I would say, was on a par, but Ryan had some name value. Ferrer had just finished "Lost Boundaries," a picture which was in wide release at the time and was acclaimed by all the critics.

If the New York office wanted somebody with a new face, a fresh face, then I very definitely would have decided upon Ferrer. But Ryan was already established, and I am sure that he would have been the choice of the New York office because of that.

Q. Had Ryan appeared in any pictures up to that time with leading female stars in motion pictures?

A. He had just finished a lead with Joan Fontaine.

Q. What was Miss Fontaine's standing at that time as a leading star, leading lady, in motion pictures?

A. She is considered one of the big stars in the business.

Mr. Knupp: I think that is all.

Cross-Examination

By Mr. Gang:

Q. I won't hold you long, Mr. Schuessler. [497]

A. That is all right. I am enjoying this.

Q. You gave your expert opinion about the best available man for this role as being a toss-up between Robert Ryan and Mel Ferrer?

A. Yes, sir.

(Testimony of Fred E. Schuessler.)

Q. Did you convey that expert opinion to Mr. Hughes?

A. I don't know whether it was to Mr. Hughes or to Mr. Rogell. To one or the other.

Q. Were you consulted when he put Mitchum in the part? A. No, sir.

Q. Did you think that this was against your opinion, Mr. Schuessler?

A. No, definitely not.

Q. In other words, you thought Mitchum was even better than Robert Ryan, didn't you?

A. Because of his standing.

Q. First say did you think he was better?

A. Yes, definitely.

Q. If you want to explain you may go ahead and explain why you thought he was better.

A. I thought he was better box-office wise, that is the reason.

Q. However, you were not consulted?

A. No, sir.

Q. And the designation of Mr. Mitchum came not from [498] you but from Mr. Hughes, is that right, as far as you know?

A. So far as I know.

Q. You don't know directly?

A. No, sir.

Q. You read about it in the papers, too, I suppose?

A. I think that is the way I learned about it, yes.
Mr. Gang: Thank you, Mr. Schuessler.

The Court: When you said that Ryan and Ferrer were the best available, will you tell us what

(Testimony of Fred E. Schuessler.)

group you were referring to as available? They were the best out of whom?

The Witness: Out of perhaps——

The Court: Give us the names. You considered a certain number of people available. Your statement was that Ryan and Ferrer were the best available. Now, who did you consider as being available at that time?

The Witness: Of those names that I recall that are on this list, you have it as an exhibit, there was Franchot Tone, Richard Basehart, Robert Preston, I don't recall any of the other names, perhaps 12, 15 or 20 names on the list of players that were available.

The Court: All right. That's all. Step down.

Do you have something else?

Mr. Knupp: Are we taking our mid-morning recess?

The Court: Yes, we will take our morning recess at this time. [499]

Ladies and gentlemen of the jury, remember the admonition of the court not to discuss this case among yourselves or with anyone else, and you are not to form or express any opinion on the case until it is finally submitted to you for your decision. The jury may retire.

Court will recess.

(A recess was taken.)

The Court: The record will show that the jury are present and in their proper places.

Mr. Knupp: So stipulated.

Mr. Gang: Correct.

CARRIE KRIEGER

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Carrie Krieger.

Direct Examination

By Mr. Knupp:

Q. Miss Krieger, or Mrs.? A. Miss.

Q. Miss Krieger, where are you employed?

A. At RKO in the wardrobe.

Q. What is your function at RKO in the Wardrobe Department? [500]

A. Well, I guess you would say sort of a cost clerk.

Q. Do you have charge of records in connection with the cost of making a wardrobe?

A. That's right.

Q. Did you occupy that position in July and August of 1949? A. Yes, I did.

Q. Do you have in your possession records that you kept in the regular course of business of the studio with respect to the wardrobe which was prepared for Miss Sheridan in "Carriage Entrance"?

A. Yes, sir.

Q. Have you those records with you?

A. Yes, sir.

Q. Will you produce them, please?

Mr. Gang: To save the court's time, if you have

(Testimony of Carrie Krieger.)

copies, Mr. Knupp, I will accept your statement that they are true and correct copies.

Mr. Knupp: I understand from your statement, then, that the statement that I have handed you may be offered as an exhibit in the case?

Mr. Gang: Yes, on the basis that this is a true and correct copy of what the books themselves would show with respect to these items.

Mr. Knupp: I will ask the witness about [501] that.

Q. (By Mr. Knupp): Miss Krieger, I have prepared a statement which I made from your records. You are not familiar with it. Will you just take a minute to compare the records which you have with you with the statement which has been prepared?

A. That is a true copy of what I have. I have the original.

Q. You made the original from——

A. From my records, from my cost cards.

Q. And that correctly sets forth the items of the costumes that were prepared for Miss Sheridan?

A. Yes.

Q. It also sets forth the cost of each item of that costume?

A. That's right.

Q. I notice that certain of these items are headed "Manufactured at studio"; what does that entry mean?

A. That means that they were made in our workroom, RKO workroom.

Q. What do the items of cost there represent?

(Testimony of Carrie Krieger.)

A. That represents material involved in making them, and also workroom labor.

Q. Do you keep a separate record of each outfit or each dress, or whatever it was?

A. Yes, sir. [502]

Q. Both with respect to material and workmanship?

A. That's right.

Q. And then the next item which you have listed is "Manufactured at Western Costume Co."?

A. Yes.

Q. The items under that heading represent what?

A. Those are costumes that they made at Western Costume and for which we were later billed.

Q. And the cost you have set forth there are the actual bills which were presented to Western Costume?

A. That's right.

Q. Now, I notice that you have an item "Cost of Altering Costumes listed below to fit Ava Gardner"; will you tell us what was done by the costume department in that respect?

A. As I remember about that, it was an attempt to salvage the wardrobe and use it for another actress, and costs were kept on that.

Q. That is to say, the original costumes that had been made for Miss Sheridan were, where possible altered so they would fit Miss Gardner who went into the role?

A. That's right.

Q. You have kept a complete record in your file of what the cost of altering those costumes was?

A. That's right. [503]

(Testimony of Carrie Krieger.)

Q. Those items that you have set forth there represent all of the costumes that it was possible to alter to fit Miss Gardner? A. Yes.

Q. And the cost of that alteration you have listed? A. Yes.

Q. The same is true under the item which you have listed as "Cost of altering costumes listed below to fit Janis Carter"? A. Yes, sir.

Q. Then, some of these costumes that had been made for Miss Sheridan were actually used in the production? A. Yes.

Q. And that is indicated on your statement under the heading, "Cost of costumes actually worn in production"? A. That's right.

Q. And you have given credit, then, on this statement, Miss Krieger, for everything that you could salvage from the costumes which were made for Miss Sheridan and which were actually used in the production? A. That's right.

Q. And you have indicated on the statement the total cost of the wardrobe which you were unable to use? A. Yes.

Q. I suppose you mean the wardrobe that was made for [504] Miss Sheridan? A. Yes.

Q. That was \$7,038.45? A. That's right.

Mr. Knupp: If the court please, we offer this recapitulation of the records of Miss Krieger in evidence as Defendant's next in order.

The Court: Exhibit D, Mr. Clerk?

The Clerk: Yes, your Honor.

(Testimony of Carrie Krieger.)

The Court: Received in evidence as Defendant's D.

(The document referred to was marked Defendant's Exhibit D, and was received in evidence.)

Mr. Knupp: I think that is all, Miss Krieger.

Cross-Examination

By Mr. Gang:

Q. The purpose of my questions is to get the facts more clearly in my mind and the minds of the jury. You are familiar with them, but we are not. Defendant's Exhibit D—Have you a copy of it, Miss Krieger? A. Yes.

Q. (Continuing.) —has eleven items of wardrobe listed under the heading "Manufactured at Studio," and three more, making a total of fourteen, listed as manufactured at Western Costume Co., is that correct? A. That's right. [505]

Q. And the total cost shown for all fourteen costumes is \$7,843.36, is that correct?

A. Yes.

Q. Under the heading, "Cost of altering costumes to fit Ava Gardner," you list, one, two, three, four, five, six, eight, nine, eleven, and twelve, which are ten items, is that correct? In other words, ten out of the fourteen actually were altered at a cost of \$1,279.36, to fit Miss Gardner? A. Yes.

Q. I assume the alterations were such that they were satisfactory for Miss Gardner, from your records?

(Testimony of Carrie Krieger.)

A. Whether they were satisfactory or not, they were cost.

Q. I mean the alterations were made so that they might be used in the picture——

A. If satisfactory, yes.

Q. Let me finish my question, please, so we will understand each other.

In other words, you altered those ten of the fourteen costumes for Miss Gardner for the purpose of making them available for use in the picture, is that correct?

A. Yes.

Q. The cost of the alteration was \$1,279.36?

A. Yes. [506]

Q. So if you had had the fourteen costumes in your wardrobe, and forget for whom they were made originally, and Miss Gardner came in to play the role, and you reached in and took those ten costumes out of the wardrobe and spent this money making them fit, \$1,279.36, as far as your records are concerned the cost to the picture of those costumes would have been \$1,279.36, is that right?

A. You mean to make them fit Miss Gardner?

Q. Yes. A. Yes.

Q. You would not have had to pay for manufacturing them, but just for altering them?

A. Well, yes, I suppose that would have been true.

Q. Two more of those fourteen were altered to fit Miss Janis Carter, items 6 and 11, and that cost \$293.82, is that right?

A. That is right.

(Testimony of Carrie Krieger.)

Q. The same thing would be true with reference to those two articles of clothing?

A. Yes, if they had worn them.

Q. So with reference to the 12 pieces which were altered for use in the picture, your total cost was \$1,573.18, is that right? A. That's right.

Q. Why did you make the list of cost of costumes [507] actually worn in production indicating that only four were actually worn in production?

A. Because according to the information I was given at the time those were the only ones that they finally approved to wear in the production.

Q. Who is they?

A. Well, the producer, director, whoever passed on them.

Q. This had nothing to do with the fact that the garments were suitable to be worn, this had to do with the fact that the scenes for which they were to be worn were cut out of the picture or not photographed, isn't that right?

A. That I don't know. I just put the cost down.

Q. As far as you are concerned, then, and from the records of your department, all of the clothes that were originally manufactured for Miss Sheridan, fourteen in all twelve of those fourteen were subsequently altered to be fit for use in the picture, is that right?

A. They attempted to use them.

Q. And as far as your records show they were fit to be used in the picture, isn't that right?

A. Yes, they were fit to Miss Gardner.

(Testimony of Carrie Krieger.)

Q. And the total cost of the alteration of those twelve items was \$1,573.18, is that right?

A. That's right. [508]

Q. If you look at your list you will see that you have a charge there for altering costume item No. 6 to fit Miss Gardner, and then you have a cost of altering it to fit Miss Janis Carter?

A. That's right.

Q. Is that the fact? A. Yes.

Q. In this case you have included the cost of changing it from Miss Gardner to Miss Carter?

A. Yes.

Q. Who told you to do that?

A. That was evidently another attempt to use that garment in the picture.

Q. As far as I can see, then, the only items listed under the cost of costumes made for Miss Sheridan on "Carriage Entrance," the only two that were made for her that were not actually fit for use in the picture were item 7, which was a negligee—purple net over petticoat, also corset and corset cover, which we have listed as costing \$864.24, is that correct, Miss Krieger? A. Yes.

Q. And item 13, street costume—skirt and blouse, costing \$475.00, and item 14, street outfit—dress, cape, and hat, costing \$525, and a jacket not completed, costing \$150.00, is that correct? [509]

A. Yes.

Q. So if we consider the items which were made for Miss Sheridan and not altered, we would only have those items I listed, 7, 13 and 14, and if we

(Testimony of Carrie Krieger.)

took the cost of altering the costumes to fit Miss Gardner, you would have the item of \$1279.36, is that correct?

A. What was that again, please?

Q. If you took the cost of altering the costumes listed below to fit Ava Gardner you would have \$1279.36, is that right?

A. I don't quite understand you.

Q. I am sorry. I will try to make it clear. Looking at your records, the cost to RKO of altering 10 items of clothing made for Miss Sheridan to fit Miss Gardner for "Carriage Entrance" cost \$1,279.36?

A. Yes.

Q. Is that right? A. Yes.

Q. Have you any way of knowing what it cost to alter costume No. 6 to fit Miss Janis Carter?

A. Do you mean broken down separately from 11?

Q. Yes.

A. I don't know. I think that went into one number. But of course this No. 6 that you refer to was actually worn in the production. [510]

Q. It was actually worn in the production?

A. Yes. So it was not considered——

Q. That doesn't concern me at this time, whether it was worn or not. What does concern me is that it was available for use in the picture, and as you have said of the fourteen items 11 or 12 at least were available for use in the picture, that is correct, is it not? A. Yes.

Q. You are unable to break down the item of

(Testimony of Carrie Krieger.)

cost of alteration of costume No. 6 to fit Miss Carter after altering it to fit Miss Gardner?

A. No, that went into one number.

Q. Isn't it a fact, Miss Krieger, that after the picture was made all of these articles went back into RKO's wardrobe?

A. Except the Western Costume.

Q. The items that Western Costume made went back to them? A. Went back to them.

Q. Did you get a credit or rebate?

A. No; those are on a production rental.

Q. That included items 12, 13 and 14. You called it rental. When did you rent them—before Miss Sheridan was fired or afterwards?

A. Western Costume was engaged to make them at the time [511] Miss Sheridan was going to be in the picture, and they keep track of their costs the same as we do, then in due course of time they present a bill for that amount.

Q. In other words, even though it wasn't rented you paid these items as rental?

A. We have to pay Western their cost of making things.

Q. And item 12, the gypsy costume, was actually used by Miss Gardner? A. That's right.

Q. The other items, 13 and 14, you paid rental for even though you didn't use them?

A. That's right.

The Court: Did you pay rental for them or pay the cost of making them?

The Witness: In a production rental Western

(Testimony of Carrie Krieger.)

Costume have to get the cost of making the garment.

The Court: Do you get title to the garment?

The Witness: No, it goes back to them.

The Court: You pay them for the full cost of making it?

The Witness: Practically.

The Court: But consider that is only rental?

The Witness: That's right, because it is made to order.

Q. (By Mr. Gang): Are you good at arithmetic, Miss Krieger?

A. Not without an adding machine. [512]

Q. We will have to do our own computation. Thank you very much.

Mr. Knupp: Just one question.

Redirect Examination

By Mr. Knupp:

Q. These items for which you have given credit on the bill, which represent the cost of altering these costumes, those items are deducted from the total cost of the costumes, that is correct, is it?

A. That's right.

Q. And those items represent the efforts which the studio made in order to make some of these costumes available for use in the picture as it was finally photographed?

A. That's right.

Q. And after these efforts had been made to alter the costumes, your statement indicates that only four of these costumes were actually available for use in the production

A. Yes, sir.

The Court: Just a minute.

(Testimony of Carrie Krieger.)

Mr. Gang: Just a moment. That is not the evidence.

The Court: Not "actually available," but "actually used."

Mr. Knupp: Yes.

The Witness: Actually used.

Q. (By Mr. Knupp: Do you know whether or not all of [513] these costumes that were manufactured at the studio or were manufactured at Western Costume Company were manufactured to Miss Sheridan's measurements?

A. Yes, sir.

Mr. Knupp: That is all of this witness.

Mr. Gang: No further questions.

The Court: It looks like a pretty good business to be in. "Negligee—purple net over petticoat, also corset and corset cover, \$864.24." I don't know what we are doing practicing law.

You may step down.

EDWARD DOWNES

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Edward Downes.

Direct Examination

By Mr. Knupp:

Q. Mr. Downes, you are in the accounting department at RKO?

A. I am working out of the accounting department at RKO, yes.

(Testimony of Edward Downes.)

Q. And you have kept the records of the amounts which were expended by RKO in the production, "Carriage Entrance"? [514]

A. No, I did not. That was kept by the picture cost department.

Q. I mean you have the records here which show that?

A. I have the records here which were compiled during the making of the picture, yes.

Q. Those records, of course, are kept in the regular course of business of the studio?

Mr. Gang: I will stipulate to those fundamental foundational questions, Mr. Knupp, and save the court's time.

Mr. Knupp: All right.

Q. (By Mr. Knupp): Can you determine from your record there, Mr. Downes, what amount was paid Mr. Travilla who was the designer of the gowns for Miss Sheridan?

Mr. Gang: May I ask a question, your Honor, in the interest of conserving time?

Mr. Knupp, is Mr. Travilla's salary in addition to the cost items which were set forth in the last exhibit?

Mr. Knupp: Yes.

Mr. Gang: And it relates to the designing of those particular fourteen costumes?

Mr. Knupp: Yes.

Mr. Gang: If the court please, if that is so——

Mr. Knupp: It relates to the services which he

(Testimony of Edward Downes.)

rendered in designing costumes especially for Miss Sheridan.

Mr. Gang: If the court please, I am going to object [515] only in the hope that if it is sustained it will save the time. In view of the fact that every item of the wardrobe was either available for use or remained the property of the defendant, whatever was paid Mr. Travilla for services rendered they got the benefit of the particular item and it, therefore, would not be relevant.

The Court: That is so largely a matter of argument rather than a matter of admissibility of the evidence. It goes to the weight.

Have you found out where this figure is? We got to arguing and you quit looking.

How about you telling us what this figure is and give Mr. Gang a chance to check it?

Mr. Knupp: I know it is \$3000.

Mr. Gang: If you say it is \$3000, I will agree to that, and if it is wrong you can look it up on your own time, and tell us about it.

The Witness: I can do that. Because all these accounts are by various numbers here, and without a check sheet it is rather difficult to find offhand.

Mr. Knupp: I suggest in that respect, if the court please, maybe we could shorten this considerably. I have prepared a detail of matters with respect to which I expected to interrogate the witness; with the aid and assistance of Mr. Gang, which he so kindly offers, we might save some time. [516]

Mr. Gang: Fine.

(Testimony of Edward Downes.)

I might state, just so nobody misconstrues my good nature, that I don't admit that any of this is relevant, important, or has any bearing on the case.

The Court: We understand your position.

Mr. Knupp: Yes, we don't expect you to admit anything, Mr. Gang. We are not asking that you should.

I have this detail in tabulated form, if the court please, the same information that the witness would glean by going through his books. I think if it could be stipulated that the examination of the witness would indicate the expenditure of these amounts from the books, I mean it would be determined the amounts had been actually expended by RKO in connection with the picture "Carriage Entrance," and during the period indicated by the detailed statement itself, we probably could excuse the witness and Mr. Gang and I could argue about the question of whether or not these are proper items of counterclaim.

Mr. Gang: I will certainly accept the figures and the items for which the figures were paid. Of course some of the editorial content I couldn't accept, but the figures and the amounts which were expended, and the date, I will certainly accept, and you can offer those items in evidence and I won't object.

Mr. Knupp: I don't know what particular literary work [517] or effort you have referred to, Mr. Gang.

Mr. Gang: You say "rewrite account of replac-

(Testimony of Edward Downes.)

ing Miss Sheridan." That is editorial. We can argue that a lot of that was for Mr. Mitchum. That is what I mean by editorial content. I don't object to the figures or the time.

The Court: Counsel have apparently agreed, so we will use the recapitulation chart, and before it is submitted to the jury if there is any editorial comment in it that one or the other of you don't like, you can strike it out. It will be Defendant's Exhibit E.

I think you should understand Mr. Gang's stipulation. This proof is offered by Mr. Knupp in support of the defendant's counter-claim against Miss Sheridan. You will recall that the studio has a counter-claim against her for a sum of money. Mr. Gang has merely stipulated that if we waded through this book we would find these figures which are on this recapitulation, and that therefore for the saving of time that the recapitulation be used rather than have the witness pull the figures out of a book. Mr. Gang, however, does not stipulate that these were necessary expenditures, nor does he stipulate that they are proper items of damage. That is a matter for you to decide. He has reserved his contention. You have heard it. I don't have to tell you about it.

Mr. Knupp: Yes, I believe the situation was clearly [518] placed before the jury.

Those are all the questions we have to ask this witness, if the court please, unless Mr. Gang has any.

(Testimony of Edward Downes.)

Mr. Gang: I stipulated myself out of cross-examination.

Mr. Knupp: I am not insisting on that, Mr. Gang. You can ask any questions you desire despite any stipulations you may have made.

Mr. Gang: Thank you. There is nothing to ask him.

Mr. Knupp: If the court please, I am not fortunate enough to be in the position Mr. Gang is; it always seems to me when someone mentions lunch it is 12:00 o'clock. But we have possibly one more witness that we can call immediately after lunch. I am not sure that that witness will be here, and if he isn't here, why, then, we will conclude with this witness. But we would like to take an adjournment until 2:00 o'clock.

Mr. Gang: Again, Mr. Knupp, I have a couple of minor rebuttal witnesses, like Mr. Banks. I would like to put him on so that he could go home and stay home, and we can use up this 15 minutes we have left.

Mr. Knupp: That is fine.

Mr. Gang: It is a little out of order.

The Court: All right. Mr. Knupp rests subject to his right to reopen, and you may proceed, Mr. Gang. [519]

Mr. Gang: Mr. Banks is called in rebuttal, and not under 43(b).

POLAN BANKS

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gang:

Q. You were in the court room when Mr. Sparks repeated, at my request, a statement he said was made by Mr. Hickox with reference to time being awasting; do you remember that? A. Yes.

Q. Do you remember any occasion on which such a subject was discussed when you were present?

A. Time being awasting as to the picture progressing?

Mr. Knupp: Could I hear that question, please, Mr. Reporter?

(The record was read by the reporter.)

Q. (By Mr. Gang): Yes. At which a discussion arose about \$10,000 a week.

A. To the best of my recollection I believe that took place as the four of us were leaving Mr. Sparks' office to walk up the lot. [520]

Q. And who were the four of you?

A. Miss Sheridan and myself were walking in front, and Mr. Hickox and Mr. Sparks in back.

Q. With reference to what particular conference can you relate this discussion? Was it at the end of July, the early part of August?

(Testimony of Polan Banks.)

A. It was quite late along in the hassle we were having about trying to find a leading man

Q. The question of time, as you now recall it, was somewhat pressing, was it? A. Yes.

Q. It would therefore place it somewhere along towards the August dates?

A. Probably in August, yes.

Q. And you say you and Miss Sheridan walked out in front? A. Yes.

Q. You had left Mr. Sparks' office?

A. Yes, we were leaving and walking up the lot, I believe, to Mr. Rogell. I am not sure about that.

Q. And Mr. Hickox was behind you with Mr. Sparks? A. Yes.

Q. And you were not in any office at the time?

A. No, we were walking on the lot.

Q. Were you fairly close together, if you remember? [521] A. A few feet ahead.

Q. You could overhear what was being said in back of you? A. I think so, yes.

Q. Can you relate that conversation as you remember it, Mr. Banks?

A. I only remember it very hazily.

Q. Repeat it as hazily as you remember it.

A. Well, I think to the best of my recollection that Mr. Hickox said something about time being awasting or pushing, or something like that, and I think he made a remark as to the fact that it would cost the studio \$10,000 a week if—rather, reminding Mr. Sparks that it would cost the studio \$10,000

(Testimony of Polan Banks)

a week with Miss Sheridan's extra weeks added to her fifteen weeks, and then to the best of my recollection Mr. Sparks made the remark rather kiddingly, "Well, Mr. Hughes could afford \$10,000 a week."

Q. In other words, Mr. Sparks made that remark?

A. Yes, Mr. Sparks definitely made that remark.

Mr. Gang: Thank you. Cross - examine, Mr. Knupp.

Mr. Knupp: No examination, if the court please.

Mr. Gang: Thank you.

May this witness be excused now, your Honor?

The Court: Yes, he may be excused.

Mr. Gang: Mr. Hickox, will you take the stand, please? [522]

ANDREW HICKOX

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

Mr. Knupp: I assume, Mr. Gang, this witness is called in rebuttal?

Mr. Gang: Yes, only in rebuttal.

The Clerk: Will you state your name, please?

The Witness: Andrew Hickox.

Direct Examination

By Mr. Gang:

Q. Where do you live, Mr. Hickox?

A. 131 North Rose Street, Burbank, California.

(Testimony of Andrew Hickox.)

Q. You have lived in California for a number of years? A. Yes, I have.

Q. You heard Mr. Banks' testimony just now?

A. Yes.

Q. Can you place the approximate date of the conversation when you and Mr. Sparks walked behind Mr. Banks and Miss Sheridan?

A. It was approximately August 11th.

Q. 1949? A. 1949.

Q. Can you repeat your recollection of that conversation, stating what was said by whom? [523]

A. Miss Sheridan and Mr. Banks were walking ahead——

Q. A little louder, please.

A. Miss Sheridan and Mr. Banks were walking ahead of Mr. Sparks and myself on the way to Mr. Rogell's office, we had just left Mr. Sparks' office, and on the way I said to Mr. Sparks, "Mr. Hughes better hurry up, otherwise,"——

Q. A little louder, please, Mr. Hickox. I cannot hear you. That is why I ask you to lift your voice.

A. On the way I said to Mr. Sparks, "Mr. Hughes better hurry up and make up his mind, otherwise it is going to start costing the studio about \$10,000 a week."

To that statement Mr. Sparks replied, "We won't worry about that, Howard has plenty of money."

Mr. Banks turned around to Mr. Sparks and said, "Rather an expensive playtime, isn't it, Bob?"

(Testimony of Andrew Hickox.)

Q. That was the end of that conversation?

A. Yes.

The Court: An expensive what time?

The Witness: Playtime.

Q. (By Mr. Gang): I direct your attention now, Mr. Hickox, to the afternoon of August 16, 1949. Did you go with Miss Sheridan and Mr. Banks to look at some film in the projection room at RKO?

A. Yes, I did.

Q. Did you at that time have a conversation with Mr. [524] Banks? A. After the film?

Q. Yes. A. A slight conversation.

Q. Did you ask him any question at that time with reference to whether or not the studio was going ahead to make the picture?

A. No, sir.

Q. Did you at that time have any conversation with Mr. Banks that you remember in which you asked whether the studio wanted to be released from its commitment with Miss Sheridan?

A. No, sir.

Q. You have no recollection of any such conversation? A. No, sir.

Mr. Gang: You may cross-examine.

Cross-Examination

By Mr. Knupp:

Q. You say, Mr. Hickox, that you had some slight conversation with Mr. Banks after you had seen the film on August 16th? A. Yes, sir.

Q. Do you recall what the conversation was?

(Testimony of Andrew Hickox.)

A. On our way from the projection room to Mr. Rogell's office I believe I said to Mr. Banks, "We are getting no [525] place." And that was about the extent of it.

Q. That is all you said? A. Yes, sir.

Q. And did Mr. Banks volunteer any reply to your statement that you were getting no place?

A. To my recollection he said, "It looks that way."

Q. Did you say anything to Mr. Banks on that occasion about it not appearing that the production would start? A. No, sir.

Q. Did you say anything to Mr. Banks on that occasion about whether or not the studio might be willing to pay Miss Sheridan \$50,000 and release her? A. No, sir.

Q. You didn't say anything of that kind?

A. No, sir.

Q. Since this litigation commenced, Mr. Hickox, have you had any conference with Mr. Banks with respect to this particular matter?

Mr. Gang: What particular matter are you referring to?

Mr. Knupp: I am talking about this particular conversation.

The Witness: No, sir.

Q. (By Mr. Knupp): You at no time discussed with Mr. Banks the question of whether or not this conversation which he has related actually [526] occurred? A. No, sir.

Mr. Knupp: That is all.

Mr. Gang: The witness may be excused as far as I am concerned.

That takes care of these two witnesses, I have one other on rebuttal, until the defendant rests.

The Court: We will take our recess.

Remember the admonition of the court, ladies and gentlemen of the jury. The case is not yet submitted to you. You are not to form or express any opinion on any of the matters pertaining to the merits of this case. You are not to discuss the case among yourselves or with anyone else until it is finally submitted to you for your decision. You may be excused. 2:00 o'clock. [527]

* * *

Los Angeles, California,
Friday, February 2, 1951— 2 P.M.

The Court: The record will show that the jury is present and in their proper places.

Mr. Knupp: Yes.

Mr. Sparks, please.

ROBERT SPARKS

recalled as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Mr. Knupp: If the court, please, I asked Mr. Sparks to return as there was some question raised with respect to the statement we filed here with respect to the time which we said was lost and the cost to the studio because this picture didn't start on August 22nd as we originally anticipated.

(Testimony of Robert Sparks.)

Direct Examination

By Mr. Knupp:

Q. Mr. Sparks, will you explain to the court what the situation was with respect to your time at the studio in connection with this picture?

A. Well, I had been assigned as producer of this picture, and while I am on a weekly salary at the studio, the time that I spend on a picture is apportioned to that picture, and at the time of the dismissal of Miss Sheridan [538] there was an accumulation of cost against this picture. It had not been determined whether the picture would be abandoned or whether it would be recast, and since I had been with the project since its inception, I was held on this to continue it in case they did revive the use of the script and material which had been prepared for the picture.

Q. Would it have been possible in your judgment as a producer for you to have been taken off the picture and then returned to the picture in the event that it was later recast?

A. I will have to answer that this way, Mr. Knupp: Apparently the studio thought that it would be to the interest of the picture that I be assigned and remain with it until it was determined what to do with it.

Q. You were not assigned to any other picture until this picture was finally completed?

A. No, sir.

Q. And during the time that you were recasting

(Testimony of Robert Sparks.)

the picture, and before finally starting rehearsals—they, I understand, started on September 26th—what were you doing?

A. In that interim period?

Q. Yes.

A. We were trying—there were many details about this production-wise which had to be organized and tied together, and there was a matter of script too that we were [539] trying to see what we would do in the event that there were different types of casting that might go into it. We still retained the project as an active project until it was determined what we should do with it, and that apparently was determined on the 26th of September, as I remember it.

Q. Was this work, at least some part of it, occasioned by the fact that Miss Gardner was substituted for Miss Sheridan?

A. That was involved in it. And later when Mr. Mitchum was assigned, that, too, occasioned some additional work on the script.

Q. With respect to the writer Marion Parsonnet, what was the situation with respect to Mr. Parsonnet?

A. Mr. Parsonnet, too, had been assigned to this as the writer, and Mr. Parsonnet was retained because he had done what he had done very capably, and it is very easy to lose a writer once he is assigned to a project if you should stop it, because he could take an engagement in another studio, and Mr. Parsonnet was retained on the

(Testimony of Robert Sparks.)

script during that period until that was determined.

Q. In other words, if Mr. Parsonnet, after Miss Sheridan's contract had been canceled, if he had been released then the question of whether he might become available for any revisions would have been in doubt? [540]

A. That was the important consideration.

Mr. Knupp: I think that is all.

Cross-Examination

By Mr. Gang:

Q. Mr. Sparks, on August 15, 1949, in what condition was the screen play?

A. We were ready to go with it on the basis of Miss Sheridan.

Q. And if you had been notified that a male actor had been appointed to play the role you could have started shooting when?

A. I think immediately.

Q. And had any time been allowed for the preparation of the man who would play that role, if and when he was assigned to it, or would he walk right on and start acting?

A. In the case—if I might be allowed to jump down to Miss Gardner going into the picture, there were, if I remember correctly, five or six days of shooting that the company could work before the actor playing the part of Mark Lucas had to be in the picture.

Q. Had you been notified of a definite starting

(Testimony of Robert Sparks.)

point of commencing principal photography in "Carriage Entrance"?

A. Had I been notified?

Q. Yes.

A. Well, no, we had no definite date, because we had no [541] definite agreement on Miss Sheridan's part to accept an actor.

Q. That is what I thought was the answer. On August 15th and August 16th, 1949, you had no definite starting date for the picture?

A. That is true.

Q. From August 22nd on, August 22nd would seem to be the Monday following Miss Sheridan's dismissal, as you put it, from that date on you continued actively on the project, you said?

A. Yes, we did.

Q. And you continued work with Mr. Banks and Mr. Parsonnet? A. We did.

Q. And what were you doing during that time from August 22nd to September 1st?

A. Well, I can't just tell you specifically.

Q. Well, give it to me generally.

A. Generally we were continuing our work on the preparation for production.

Q. And what was that work, Mr. Sparks?

A. Well, that had to do with script, that had to do with script polishing.

Q. Let's take that first, script polishing. What did you do in the interval of time between August 22nd and [542] September 1st polishing the script, do you remember?

(Testimony of Robert Sparks.)

A. Your question isn't clear to me, Mr. Gang.

Q. Let me rephrase it. You say you worked between August 22nd and September 1st on script, polishing the script. Is that what you said?

A. Yes.

Q. What did you do?

A. We edited our script.

Q. All right. Edited it with reference to what?

A. Well, my assignment on this was to prepare a script, and that included the editing of the script.

Q. What do you mean by editing? What did that consist of? Cutting out parts, shortening it?

A. That could be cutting out parts, it could be shortening it, it could be rephrasing it, it could be rearrangement of scenes.

Q. This you would have done whether or not Miss Sheridan played in it or not?

A. Perhaps. There was a lot of work to be done on the script at that time, so we were proceeding with it.

Q. So as to that, at least, Miss Sheridan's not being in the picture had nothing to do with the work you were doing?

A. Well, we had to prepare the script for a leading lady, Mr. Gang.

Q. But at that time you didn't know who the leading [543] lady would be, did you, Mr. Sparks?

A. I didn't know, no.

Q. You weren't polishing it for any particular leading lady, were you? A. No.

(Testimony of Robert Sparks.)

Q. You weren't polishing it for any particular leading man during that interval of time?

A. No.

Q. You weren't fixing the script up by anything Miss Sheridan did? A. Perhaps.

Q. Is that right? Not perhaps.

A. Supposing Miss Sheridan and the studio had reconsidered their position in this and come back into it and we had to start quick, that was a contingency.

Q. Part of the work you did was in the hope that Miss Sheridan and the studio would get together? A. Perhaps.

Q. Tell me definitely, you are the one that did it.

A. We had a leading lady, may I say that?

Q. You had a leading lady?

A. That we would have a leading lady.

Q. That would be true if Miss Sheridan would have been the leading lady? A. Yes. [544]

Q. The work you did during that interval had nothing to do with Miss Sheridan's being dismissed?

A. No.

Q. Would this be true of what Mr. Banks did and what Mr. Parsonnet did?

A. Yes, I guess it would have been.

Q. What you have just said would be true with reference to the time from August 22nd until September 1st would also be true from September 1st to September 9th when the news leaked out that Gardner and Mitchum were to play the part?

A. Yes.

Q. When did you first learn that Gardner and

(Testimony of Robert Sparks.)

Mitchum were to play the male and female leads?

A. I think it was sometime around the 10th, I believe, of September that Miss Gardner was going into the picture.

Q. Were you given any instructions about what to do with reference to the screen play?

A. No, that was left to my judgment. There were things to be done because this was a completely different kind of casting than we had with Miss Sheridan playing the part.

Q. You therefore went to work about the 10th or 11th of September, 1949, and revised the script not only for Miss Gardner, but Mr. Mitchum? [545]

A. No, Mr. Mitchum we didn't do those revisions until around the 26th of September.

Q. Between the 10th and the 26th you were just revising it on account of Miss Gardner?

A. That's right.

Q. That is all you did during that period of time? A. Yes.

Q. You are sure of that?

A. I am positive.

Q. When Mr. Mitchum got in you did work for Mr. Mitchum, is that right?

A. That's true.

Q. Are you able to segregate how much of your time or Mr. Banks' time, or Mr. Parsonnet's time was devoted to what you did in fixing the screen play from September 10th to October 3rd for Mr. Mitchum, can you break that up in your own mind?

A. Mr. Mitchum was from the 26th of September.

(Testimony of Robert Sparks.)

Q. All your time from that time on was devoted to fixing it for Mr. Mitchum? A. Yes.

Q. Your salary was then \$1150 per week, is that right, Mr. Sparks? A. That is true.

Q. Were you doing anything else during the time between [546] August 22nd and September 26th? A. No.

Q. What time would you get to the office?

A. 9:00 in the morning.

Q. And on each day would you meet with Mr. Banks and Mr. Parsonnet?

A. Probably we did. I can't recall. I can't recall, Mr. Gang. That has been 18 months ago. I don't remember. I can't break it down.

Q. You did nothing else. You didn't read any proposed story for future work on your part?

A. I don't recall that I did, no.

Q. Is it possible that you did?

A. It is possible, yes.

Q. It is your custom, is it not, when working on one picture to be reading other scripts and stories with reference to your future work?

A. That is true.

Q. And there was no reason for you to alter your custom during this period of time?

A. That is true.

Q. There was some doubt in your mind during this time as to whether the project would be abandoned or go ahead? A. That's true.

Q. Does that refresh your recollection that you were [547] looking for other work to do in case

(Testimony of Robert Sparks.)

it was abandoned?

A. We had other assignments there, Mr. Gang, that perhaps could be made available to me when I had the time to take them on.

Q. During that time did you do anything in looking them over to see what you should be doing?

A. I have a very good knowledge of what stories are at RKO.

Q. And your present testimony is to the best of your recollection that every morning from 9:00 to 9:30, when you got in, until 5:30 at night you were working on "Carriage Entrance."

A. Yes.

Mr. Gang: Thank you.

Redirect Examination

By Mr. Knupp:

Q. Mr. Sparks, I understand that this production as far as you were concerned, assuming Miss Sheridan was to appear in the starring role, was ready to start on August 22nd?

A. We were ready with our script to begin around that time, yes.

Q. So that the work that you did subsequent to August 22nd, if you had to do additional work in connection with that script, would have been done during the period when the [548] picture was being photographed?

A. Well, the work from that period on, Mr. Knupp, concerned the fact that Miss Gardner came into the picture.

(Testimony of Robert Sparks.)

Q. But assuming now that there had been no change and Miss Sheridan had performed the leading role, any additional work that you had to do on the script would have been done during the time of photography?

A. It could have been, yes, in case Miss Sheridan had not approved the script or wanted something changed.

Q. So whatever additional time you had to put in on the production after August 22nd would have been necessary even if Miss Sheridan—I mean to say you would have done that work even if Miss Sheridan had appeared in the picture?

A. If I thought it was necessary, yes.

Mr. Knupp: That's all.

The Court: By the way—again, counsel may object to this question.

Mr. Knupp: I don't object to any questions the court asks.

The Court: You haven't heard the question.

Mr. Knupp: At least not until I hear them.

The Court: After it was decided within the studio to put Mr. Mitchum in this picture, did you or anybody else in an executive capacity at the studio go back to Miss Sheridan and say, "Now Mr. Mitchum is available, all will be forgiven, [549] come on back and we will make the picture"?

The Witness: No, sir.

The Court: All right. That is all.

A Juror: What was that answer, your Honor?

The Witness: No, sir.

Mr. Knupp: Mr. Stevenson.

ROBERT STEVENSON

recalled as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Knupp:

Q. You were assigned as director in this picture, Mr. Stevenson? A. Yes, sir.

Q. You worked on it until the picture was completed? A. Yes.

Q. And it was contemplated that the production would start about August 22nd?

A. I don't remember the date.

Q. Well, whatever the date was, from the date that the picture was started until it was completed did you devote your entire time to the production?

A. Yes. [550]

Q. What did you do in that connection? There was a period from August 22nd, when you originally expected to start, to September 26th when the tests for photography started, what were you doing during that interval?

A. Part of that time I worked on the script with Mr. Parsonnet and Mr. Sparks. The rest of the time was given over to my own preparations for directing the picture.

Q. In the event that the picture had started on August 22nd with Miss Sheridan in the role, would the work that you did, to which you have just re-

(Testimony of Robert Stevenson.)

ferred, would that have been done by you during that period? What I mean to say is, is the work that you did work that you would have done during actual photography if the photography had started August 22nd?

A. I don't quite follow you.

Q. You testified you did certain work with Parsonnet, and you said you did certain work in connection with the preparation of the picture. Assuming that the picture started August 22nd, when would you have performed that work?

A. Part of the work on the script was in connection with the change to Ava Gardner, part of it was not, and that, if we got those ideas, would have been done during the making of the picture.

Q. What about your additional preparation for direction? [551]

A. I either wouldn't have had time to do it or would have done it during the shooting of the picture.

Q. You merely feel that the result would have been that you would have been less well prepared to direct it? A. Yes, sir.

Mr. Knupp: I think that is all.

Mr. Gang: No questions, Mr. Stevenson.

The Court: The record will show that the witnesses just called, Mr. Sparks and Mr. Stevenson, are called as part of the defendant's case in chief.

Mr. Knupp: That is right, if the court please.

The Court: In connection with Exhibit E, which was admitted this morning.

Mr. Knupp: That is our case now, your Honor.

Mr. Gang: Will the court indicate for the record that a motion is made to strike the counter-claim, and for a directed verdict on behalf of the plaintiff on the complaint. We will argue it after I put my rebuttal on so we won't have the jury running in and out.

The Court: That is permissible. Is it all right with you, Mr. Knupp?

Mr. Knupp: That is all right.

Mr. Gang: Miss Sheridan, take the stand. [552]

ANN SHERIDAN

recalled as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gang:

Q. This is what we call rebuttal, Miss Sheridan, which is merely to get your version of one conversation which was testified to as part of the defendant's case. That is with reference to the conversation which was fixed at about the 11th of August, 1949, in which the subject-matter of delay was discussed. Do you remember walking across the lot at RKO with Mr. Banks and Mr. Hickox and Mr. Sparks?

A. Yes, I do.

Q. Is that clear in your mind?

A. Yes, sir.

(Testimony of Ann Sheridan.)

Q. Can you give us your account of what happened on that occasion?

A. We were in the quadrangle, actually, of the RKO lot, crossing to Mr. Rogell's office, Mr. Sparks—I beg your pardon, Mr. Banks and I were walking ahead, Mr. Sparks and Mr. Hickox following, and there was sort of a burst of laughter, I would call it, we heard noise, anyway, and both Mr. Banks and I turned and asked the reason for the sudden merriement, and Mr. Hickox said that he had just said to Mr. [553] Sparks that Mr. Hughes had better hurry and make up his mind, otherwise it would pretty soon start costing him about \$10,000 a week, to which Mr. Sparks had replied that we wouldn't worry about that, Howard had plenty of money.

Mr. Banks said something to the effect that that was a pretty expensive pastime, and we continued to Mr. Rogell's office.

Mr. Gang: Thank you.

The Court: So that there will be no misunderstanding, this talk about \$10,000 a week extra, refers to additional time under the contract if the picture was not completed within a certain fixed time set forth in the contract.

Mr. Gang: That is correct. That would refer to time beyond 15 weeks from July 6th, 1949.

The Court: All right.

Cross-Examination

By Mr. Knupp:

Q. Miss Sheridan, you have heretofore testified

in this case and have testified, as I understand it, covering all of the conversations that you had at the studio with Mr. Sparks? A. Yes, sir.

Q. At no time during that testimony, as I recall, did you relate this conversation which you have now related? A. No, sir. [554]

Q. Has your memory been refreshed with respect to that matter? A. To what matter, sir?

Q. This conversation to which you have just testified. A. Yes, sir.

Q. And how was your memory refreshed?

A. When you brought it up.

Q. Did you talk to Mr. Hickox about it?

A. Since he has been in court, yes.

Mr. Knupp: That is all.

Mr. Gang: That is the conclusion of the case, your Honor.

You may step down, Miss Sheridan.

Mr. Knupp: We have nothing else, if the court please.

The Court: Both sides rest, is that correct?

Mr. Gang: Yes.

The Court: I think we had better excuse the jury until Tuesday morning, don't you think so? Let me look just a minute here.

There is a possibility that we might have time for the arguments Monday afternoon, if you limited yourselves to an hour apiece, and instructions Tuesday morning. That would mean, however, that the jury would be coming in only a half day on Monday. Or we can ask them to come in at 9:30 Tuesday

morning, have the arguments and instructions, and they [555] can get the case either before noon or right after noon Tuesday. What is your preference?

Mr. Knupp: Either one is satisfactory with us, if the court please. Tuesday morning would suit me. If the jury is going to come back, they might as well come back in the morning and then they can finish the matter that day, without the possibility of them coming back Monday afternoon and then coming back Tuesday.

Mr. Gang: That makes good sense to me, if the jury doesn't mind.

The Court: I think we will have you come in Tuesday morning. We have on Monday a calendar day, motions in this court, also our monthly setting calendar, we have some 60 cases ready to be set, and that takes a long time just to call the cases. I couldn't get to you until the afternoon, and there is always the question, then, of whether we can get to you. You had better come in Tuesday morning. We will make it at 9:30.

The jury will be excused at this time until 9:30 Tuesday morning. Remember the admonition of the court. The case has not yet been submitted to you. You still have to hear the argument of counsel—I should say you are still privileged to hear the argument of counsel and the instructions of the court, and it is at that time that you should get started on making up your minds. So until then [556] you will refrain from discussing the case among yourselves or with anyone else, and you will not form or express any opinion on the merits of this case

until it is finally submitted to you. You are excused until 9:30 Tuesday morning.

(The following proceedings were had in the absence of the jury:)

The Court: The record will show that the jury is now absent.

Mr. Gang: I first would like to present the motion which is either for a non-suit on the counter-claim, or perhaps for a directed verdict for the plaintiff on the defendant's counter-claim.

I present that motion, your Honor, on the following grounds:

On any theory of the case, your Honor, looking at paragraph 29, it is conceded that the defendant as the employer, had the ultimate right to make a final order assigning or selecting a man to play the leading male role. Mr. Knupp so stated in his opening argument, and that has at all times been conceded to be so. The contract merely gave Miss Sheridan the right, once a final selection had been made by defendant, to approve or disapprove. If she disapproved——

The Court: Where do you find that spelled out in the contract in so many words? I don't find it written that way. [557]

In paragraph 1 the only language there is:

“Artist shall not, however, be required to render any services pursuant hereto unless and until she has approved each and all of the following:

“(c) The actor who will portray the leading male role in ‘Carriage Entrance.’ ”

Until she has approved the actor——

Mr. Gang: There isn't any question that she had approved, and from July 6th to July 8th, 9th, 10th, 11th and 12th, there was an approval of an actor in effect and she was rendering services.

This is uncontradicted in the record, your Honor. What happened was after she had commenced rendering services.

As far as defendant is concerned, you cannot construe this any other way than it is written here. She had started to render services, she had been obligated ever since April 29th when she had approved. That approval stayed in effect until after July 6th when the term began and continued in effect until Mr. Young bowed out. So the defendant had required plaintiff to and plaintiff had actually rendered services when the situation arose with reference to Mr. Young's refusal to play the part. That is very plain. [558]

Point 2, the contract and the clause in question is the clause only for the benefit of the defendant here. You therefore have to read it in that light.

The Court: Now you are talking about 29?

Mr. Gang: I am only talking about paragraph 29. That is the clause which is concerned with this motion which I am now arguing.

The point I just made was that the second sentence of paragraph 29 related to a situation if the artist does not approve any of the items and does not render services.

I just pointed out that was no longer applicable, because on July 6th and thereafter the artist had approved, the defendant had accepted that approval, and services had been rendered.

On that set of facts, and that is the uncontradicted evidence because this is the defendant's evidence too, there isn't any conflict on that, your Honor—in view of that, and I am directing myself at this time only to the question of the counter-claim, in view of that evidence and the uncontradicted evidence, there is no room here for any counter-claim by the defendant, in view of the fact that what occurred thereafter does not come within the purview of paragraph 29 as written by the defendant.

The next point. Assuming that your Honor construes it so that it doesn't mean what I think it means, I will [559] direct myself to that possibility. May I say that I hope your Honor realizes that I believe that in all your rulings, even though against me, you have done it the way you see it, and I have no quarrel with that. That is, no personal quarrel, whatever the legal quarrel may be. I do say at this time, now that all the evidence is in, and I am again speaking only of the counter-claim, on any theory whatever, if paragraph 29 or either sentence thereof is operative, on defendant's own theory, insofar as the counter-claim is concerned, it can only be based on evidence to the effect that the plaintiff who had the right to approve or disapprove, or the privilege, whichever word you want to use, that the mere exercise of the privilege or

right of disapproval, assuming it was exercised, the point I make is that on the main case our position, of course, is that she never was given the right by any final choice of selection by the defendant to exercise that right of approval or disapproval, whatever discussion might have taken place before, but assuming for this argument only that the defendant did what it never did, which is, said, "Well, we have listened to you, we can't get together, we are therefore assigning Mr. Robert Ryan to the role, and the picture starts with Ryan, and if you don't approve him, as you have a right not to approve him, you are fired, or we terminate the contract," that would have been a termination of the contract by right. [560]

Assuming that they had done that, I think it is the defendant's position, I think he has made it clear, that RKO could have spent \$1,000,000 up to that point and they would have no recourse against plaintiff, because she had the right, exercised in good faith, to disapprove anybody. I say "exercised in good faith," because there is a great deal of difference between reasonable and unreasonable. The evidence here conclusively shows, and I speak of the evidence of the defendant's, particularly of Mr. Rogell, who said that the first film Miss Sheridan saw of Robert Ryan was unfortunate because it showed him as a broken-down prize fighter with cauliflower ears, and they were never able to overcome that first impression put in Miss Sheridan's mind. There wasn't a single witness put on by the defendant that said Miss Sheridan had been arbi-

trary or capricious in the position she took as to any of the names that had been mentioned in the discussions.

I say nothing about our witnesses; I speak only of the defendant's witnesses.

On this particular point, your Honor, it would merely serve to confuse the jury if any issue were submitted to them on the counter-claim because there isn't one piece of evidence from which an inference might be drawn that the plaintiff acted otherwise than in the best of good faith.

The meetings of August 15th and 16th, before she was [561] fired, showed that at that time she was still trying to get them to assign somebody who would meet with her approval.

So I say again, your Honor, on the defendant's evidence alone defendant has not only not shown lack of good faith, it has affirmatively shown good faith on the part of Miss Sheridan, and even reasonableness, which is far and beyond what is necessary.

Third and last, even if you assume that there is enough evidence from which an unreasonable jury might infer lack of good faith, there isn't any evidence on the issue which is material.

You heard Mr. Sparks. There is absolutely no differentiation before this court as to how much of the money that was spent after August 22nd was really spent because Miss Sheridan quit, and how much they spent because they had to fix the thing up for Mr. Mitchum and Miss Gardner. No differentiation at all.

In that connection, I think the damage point itself is erroneously taken by the defendant. Assuming that there was a breach of contract by Miss Sheridan, damages were fixed at the time of the breach, if there was a breach, which could have only taken place on August 16th. The burden is on them to mitigate damages, not to run them up by going on from then on.

At that time, if she had breached the contract, whatever [562] the damages were at that time it would necessarily have been up to the defendant to show what the damages were as of August 16, 1949, which would have meant what money they spent up to that time, which they could not recoup, and which they did not subsequently recoup in making the picture.

I submit on the issue of damages alone the defendant has misconceived the time when the damages were incurred, and the evidence submitted on the damage point is certainly not in any sense sufficient to go to the jury.

I respectfully submit that the motion of the plaintiff should be granted.

The Court: I want to hear from Mr. Knupp on part of this.

On the question of damages, damages can accrue after breach; they don't have to accrue right at breach.

I think it is true there is a lot of uncertainty as to how much of this alleged damage might have been caused by the wrongful act of Miss Sheridan,

if there was such a wrongful act. However, that is sort of a question for the jury.

I am a little intrigued by this contention that there isn't any evidence from which a jury could find that Miss Sheridan had been guilty of bad faith.

As I have to end this matter, if the jury should go out and find Miss Sheridan had been guilty of bad faith, and this court thought that the jury was plainly wrong, or to put it [563] another way, this court thought there was not evidence upon which that verdict was based, the court would have a right to set that verdict aside.

I would like to have you spell out for me how you would say that there is any evidence of bad faith, or whatever other ground there might be, to predicate a wrongful act on the part of Miss Sheridan.

Mr. Knupp: The situation, as I see it, if the court please, is this: We conceded, of course, that Miss Sheridan up to the time that this contract was terminated had the right at all times to approve or disapprove anybody that we proposed for this role, and I also concede that Miss Sheridan had the right to use her honest judgment in that respect. I could only hope in this case, if the court please, to persuade the jury that there was evidence of bad faith if it appeared to the jury—and, of course, the court is sitting as a thirteenth juror—that these people who had been presented, proposed by the studio for this role, were capable, were available, and were adequate casting for the part, and that despite that

fact Miss Sheridan not only refused to approve any of those proposed actors, but she insisted on her part that they should appoint Mr. Franchot Tone, whom the studio had expressly said they would not appoint to the role.

I think the question of just where Miss Sheridan was [564] exercising her legal right to approve or disapprove—and as I say, if she disapproved and the jury thought she disapproved in good faith, we have no cause of action on the counter-claim, as our only basis for the counter-claim would be that we had proposed to her repeatedly men who were available for this part and were adequate for the part, and that she without sufficient consideration of the merits of those actors had not only refused to approve one of those men, so that the production might proceed, but she had insisted on a right which she didn't have, to name somebody herself for the leading male role, and I think——

The Court: Let's see there. As far as Miss Sheridan's conduct is concerned, there are a number of things she didn't do. She didn't get off and sulk, she didn't say "Well, I am not going to take that man, you won't take my man, so I won't talk to you." She apparently came down every time you asked her to come down, she looked at pictures every time you asked her to look at pictures, even up to the eleventh hour when apparently you were getting ready to pull the plug on her; she was in talking to Youngman, trying to find out if there wasn't some way to get this thing going. I don't see how a jury could—of course, my experience

with women is limited—but I can't see but what that is fairly reasonable conduct on the part of a woman, judging by some of my experiences. [565]

As I say, she didn't set her feet, she didn't sulk; she conferred, she was present, she looked at pictures.

You say she kept insisting on Tone. I heard a witness make that statement from the stand, but as I see this picture, she said Tone would be satisfactory, and she named several other people who would be satisfactory, and she was the one who was continually bringing in new names, and in that sense she was the one that was trying to save the negotiations.

While the evidence is fairly clear that the executives of RKO were kind of under instructions to sell her Ryan or Ferrer.

Mr. Knupp: It is perfectly proper if they were, if the court please, because in their judgment they were spending a lot of money on this picture, they had these men under commitment.

The Court: I can understand that, but she had told them why they weren't acceptable. So instead of showing the open-mindedness which she did in proposing other people, they talk a little while and then they come back again to Ryan and Ferrer. Well, she said, "I don't want Ryan and Ferrer." It is like playing a record over and over again. So clear to the end you get the impression that as far as the studio is concerned they were going to sell her Ryan or Ferrer.

Can you say that she exercised bad faith when

she had once said "I don't want them, they don't fit, I don't think [566] they will do"?"

The mere fact that she stuck to her position and didn't change, you might say that is stubbornness. She, however, conferred about it, she saw other runs of pictures with the men.

Mr. Knupp: The court says the studio was bound to sell her Ferrer or Ryan. They did make an effort to do that, but beyond that they went out and got men that they thought would be adequate for the casting, that were not under commitment, They offered her those. They offered her Preston and Basehart, and she had no interest in those men. She wouldn't express any interest in them. I don't know. Maybe the jury will feel exactly as you do, I don't know. I say that is a question of fact as to whether or not what she did constituted the exercise of bad faith on her part.

The Court: What do you say is her bad faith now?

Mr. Knupp: I say that her bad faith, if any existed in this case, must be found in her continued refusal to accept adequate actors for the part, and her insistence upon the appointment of a man that she knew the studio couldn't consider.

The last time she met with Mr. Rogell, as he said, the only thing she suggested was Doc Tone, she insisted on Doc Tone.

He asked her expressly again whether or not after she had [567] seen these pictures she wouldn't consider Ryan or Ferrer, or Basehart or Preston, and she said no, she would not.

I admit, if the court please, on this question of bad faith on the part of Miss Sheridan the line is very fine, because she had an absolute contract right here. She never had to perform at all. If they would have appointed Clark Gable to this picture, Miss Sheridan could have said "No, I don't want to perform with Clark Gable." Then the question of whether there was some motive behind that, except her merely exercising her contractual right, might still have raised the question of whether she was exercising good faith.

The mere fact that she didn't have a chance to approve a man like Clark Gable isn't decisive of the question of whether she was proceeding in good faith.

Then the court is entitled to take into consideration here the testimony which is in the case, that not only in the conversation with Banks, but also in the conversation with Youngman, it was indicated by Miss Sheridan, or her representative, that they thought the picture was not going to start, and they wanted to know what kind of settlement they could make with the studio.

That is our position, if the court please; that is, what there is to it, and we never get away from the proposition that this right with respect to approval was an absolute [568] contract right.

The Court: That's right. That is why it looks to me that it becomes more important to spell something out that could be called bad faith.

Mr. Knupp: I think on that issue it is just a question of what the court feels about the situation.

Myself, I feel that there is sufficient evidence here from the facts which I have referred to which would justify a jury, if they viewed the evidence that way, in concluding that Miss Sheridan didn't at any time intend to perform and didn't intend to accept any of these people that were proposed, and that her actions and her statements were all predicated upon an attempt to put the studio in a position where it knew it couldn't propose anybody that she would approve.

The Court: It is not so much arguing the weight of the evidence. That doesn't help us any. There are answers on the weight of the evidence to some of the things that you mentioned. I am more concerned in what particular things——

Mr. Knupp: I have told you everything that I think there is in the evidence that would sustain our position. I do think it is a question of fact for the reasons that I have indicated.

The Court: This motion has more implications than appear on the face of it. Is that right? Because if this [569] motion should be granted, granting a motion for a directed verdict on the counter-claim on the ground that there is not sufficient evidence of bad faith on the part of Miss Sheridan, then by the same token a similar motion would lie as to your contention that she is entitled to no compensation at all.

Mr. Knupp: I don't think that follows, if the court please. Because if she had exercised good faith, I still think under this contract she might have refused to approve and still the question would arise as to whether she was entitled, strictly

from a construction of the contract, to any compensation. If we assume that the studio was acting in good faith in the proposals of these different people to portray this part, and that Miss Sheridan was acting in good faith in refusing, we still have the contract provision which gave her the right to refuse to approve, and which provided that if she didn't approve she was not entitled to any compensation.

I think there are three possible situations which this case presents:

One in which Miss Sheridan is entitled to recover because of the facts; one in which neither party is entitled to recover because of the facts; and, third, one in which the studio is entitled to recover because of the facts.

I think all of those are issues of fact for the jury to determine. [570]

But so far as the question of whether or not the decision on this motion would affect a decision on whether Miss Sheridan is entitled to any compensation at all, I don't think it does.

My own view is assuming that both parties acted in good faith, still under the contract if there was no approval Miss Sheridan was not entitled to compensation. The defendant had the right to terminate the contract as and when it did.

The Court: I think maybe we are talking about the same thing, but your defense to her suit is two-fold: One is that you defend on the ground that she was guilty of bad faith; you defend on the

ground that if both parties were in good faith, she is still not entitled to recover.

Mr. Knupp: Yes.

The Court: What I am trying to say is, if I grant this motion doesn't it kick one of the legs out of your defense stool?

Mr. Knupp: I think it only affects the situation with respect to our counter-claim, if the court please. If you grant this motion, it certainly does a lot of injury to our counter-claim.

The Court: This is the kind of motion that I also have a right to take under submission and reserve ruling on and rule after the jury has ruled on it, is it not, under the [571] rules?

Mr. Gang: The purpose of the motion was not to confuse the jury. I was about to make a motion which would fit in with what you just said, which was for a directed verdict for the plaintiff on the second leg of the defense, in which case your Honor would have the right to reserve that, because that would be necessary to lay a foundation for a judgment notwithstanding the verdict in the event, remote, I hope, that the jury did not bring in a verdict favorable to the plaintiff.

The Court: On this motion I have a right to reserve ruling and pass on it after the jury ruled, do I not?

Mr. Gang: I cannot say. I am not expert enough in procedure.

Mr. Knupp: The rule, of course, refers to a motion by the parties, either defendant or plaintiff, and gives the court the right to reserve its decision.

It doesn't say specifically on counter-claims or complaints, or the affirmative defenses. I assume the court is correct in its statement that it has a right to reserve its rulings on motions made by anybody at the end of the adversary's evidence. It is rule 49(a) and (b).

The Clerk: Rule 50, I think.

The Court: The clerk says Rule 50.

Mr. Knupp: I have great regard for the clerk, but I [572] think this is Rule 49(a), your Honor will find.

Mr. Gang: I am out of this argument. I don't know the numbers.

Mr. Knupp: Maybe the clerk is right and I am wrong. I am talking about verdicts.

(Short delay in proceedings.)

The Court: Your first motion is a motion for a directed verdict on the defendant's counter-claim?

Mr. Gang: Yes, your Honor.

The Court: Now, what is your second motion?

Mr. Gang: The second motion is for a directed verdict on the plaintiff's complaint.

In making this motion, your Honor, we are of course reserving plaintiff's objections which were made to the court's pre-trial order, and particularly that portion thereof in which the amount of our recovery was limited if we recovered to \$50,000 instead of \$150,000 and 10 per cent of the profits. In other words, I don't want the motion for a directed verdict to waive our objection to that phase of it.

The motion is based on the following grounds:

That the uncontradicted evidence shows that plaintiff commenced the rendition of her services on the contract and actually did become obligated to perform under the contract;

Second, that the defendant made no final order either in writing or orally requesting plaintiff to exercise her privilege of approval or disapproval with reference to any [573] particular actor named for the leading male role;

Third, that RKO, the defendant, never assigned any actor as a final selection by defendant with a statement to plaintiff indicating to plaintiff that plaintiff could either approve or disapprove, and in the event of disapproval that plaintiff would not longer be employed;

Fourth, that the evidence with reference to discussions between plaintiff and defendant is evidence only of an effort to arrive at a meeting of the minds so that defendant in submitting an actor would know in advance what plaintiff's opinion would be if submitted.

Finally, as I have said before, there is absolutely no evidence in this case, either that plaintiff acted in bad faith or that plaintiff acted other than reasonably and in accordance with the terms of the contract insofar as they related to the obligations of the plaintiff.

The Court: We are right back on paragraph 29 again, aren't we?

Mr. Knupp: Yes, if the court please, except for this one matter that Mr. Gang has argued with respect to approval or disapproval. I don't think

conditional limitation, namely, that he didn't have to perform, and everybody knew that he didn't have to perform.

The Court: But the point is that the second sentence of 29 talks about the actress' approval. It says: However if, because the artist does not approve any one or more of the items specified in paragraph 1, artist does not become obligated to render services.

Sheridan was obligated as far as Young was concerned, as far as her part was concerned, she had obligated herself by Exhibit 2, the letter of approval.

It is true there was a possibility of an avoidance of this contract by Young coming along and saying "Well, I won't work." But it wouldn't have changed her obligation. Once Young had said "Well, I will take it," she was tied up in her approval.

Mr. Knupp: And once Young said that to RKO, RKO was tied up. But until he said that, neither of them were.

The Court: She was obligated.

Mr. Knupp: If Young didn't approve, she was in the same position. She said to RKO, "If Young doesn't approve, you can appoint somebody else, but if you do it must be somebody I approve."

There is no question but what the contract contemplates the approval of someone who is going to perform the role; [577] not someone who might have been approved conditionally.

The Court: Supposing RKO had not thought about RKO's clause, they hadn't thought about it

and they suggested Robert Young, and Miss Sheridan came along and approved Robert Young, and they started to make the picture, would there be any question but what she was obligated?

Mr. Knupp: None at all, if the court please; there would be no question in my mind if Miss Sheridan hadn't reserved this right of approval, that there would have been a contract, an immediate contract under which RKO was obligated and so was she. But because of the fact that both of them contemplated these conditions which might arise, they never did reach a point where they had an agreement as to who the leading man was to be.

I think the contract very plainly contemplates until that essential feature of the contract had been reached by an agreement between the parties, that nobody was bound to perform.

That is the only way I can interpret the contract.

As I say, if Miss Sheridan had come in here and said "I approve Robert Young," and the studio had undertaken to secure the services of Robert Young, without any limitation, or if Miss Sheridan had not reserved her right of approval as to the leading male actor, when she signed this contract, if she signed a straight contract and said "You can appoint [578] whoever you think is best in this picture," then both parties would have been bound.

But that isn't what they contemplated.

The Court: Again, that isn't what the contract says. None of us drew this contract so we can talk about it. It says in paragraph 1:

"Artist shall not, however, be required to

render any services pursuant hereto unless and until she has approved * * * the Actor who will portray the leading male role.”

It doesn't say that the studio had to approve him. It didn't say that the studio had even to suggest it.

We infer some of those things.

But the point is the particular provision there was that she was given the right to say “I approve,” and once she said “I approve” she was bound.

Mr. Knupp: Certainly if she said that unconditionally she would have been bound, and so would have been the studio. If the studio had proposed to her unconditionally, “We propose to put Robert Young in this picture,” and she said “I approve,” that's the end of it. But if the studio says “We are going to put Robert Young in this picture if he will agree,” and she says “I will approve him if he goes in the picture, but if he doesn't go in the picture, then anybody else you secure I will have to approve,” that is different. [579]

Now, she said that she approved Robert Young, as your Honor says, but then she went on to say “If you appoint anybody else, then I have the same right of approval with respect to the person that you appoint as I have with respect to Robert Young.”

The Court: That's right. I think that the parties originally had, on April 29th, a contract, on which each of them were bound in certain ways, as I indicated in one of my earlier memoranda, part of which I still adhere to and part of which I think

I was wrong about. I think after April 29th if Miss Sheridan had said "Forget about the contract, I am going to work for M-G-M," I think they would have brought an action restraining her. And I think if the studio had said "Forget about the contract, we are through with you," I think she might have had some remedy.

I am not too sure about that end of it.

Mr. Knupp: Could I interrupt your Honor right there?

The Court: Yes.

Mr. Knupp: I think as far as the studio is concerned if they would have said that to Miss Sheridan without submitting this role to Robert Young in order to secure his approval, I think under the rule of good faith the studio would have been bound.

The Court: If what?

Mr. Knupp: I think under the rule of good faith unless [580] the studio made a good faith endeavor to secure the services of Mr. Young in this part, I think they would have been bound.

I don't think they would have said, after April 29th, without submitting this script to Robert Young, that they weren't bound by their contract. They were bound, they were bound to submit it.

And I think, also, with respect to that matter, that unless they did make an early, or at least a reasonable attempt to secure his approval, at any time when Miss Sheridan felt that they had had an opportunity to submit the script to Young and secure his approval, and hadn't done it, she could have well said to them "Well, I said that I would approve Robert Young, but you said to me you

didn't know whether he would perform; now I want you to submit this script to Robert Young and see what he is going to say, and I am not going to sit around here waiting to find out."

There never was any discussion, apparently, between the parties. The script was being rewritten, and apparently both people thought it was being rewritten to see what Young was going to say about it.

The Court: Going back to what I said, I think beginning April 29th there was a contract that bound both parties on certain obligations, but there were still things that had to be done, one of which was approval of an actor. [581]

Simultaneously with the contract Miss Sheridan delivered Exhibit 2, which said "I approve Robert Young."

I think you then have another stage of the contract that ran along to about July 11th, in which she was now bound on her approval as long as Young remained in there, but there was a possibility of a defeasance, if I could use that word, or avoidance, in that Young might crawl out on his side. That was something she had no control over. As far as she was concerned, she now had approved Young, he was part of the package deal that had been bought by the studio from the date that she delivered the letter on April 29th and the date she signed the contract. She was stuck with Young, she was bound. But there was a possibility of avoidance on the part of Young or the studio.

Now, Young comes along July 9th, and says "I

have looked at the script, I won't take the part." I think it is a fair interpretation from then on, if nothing else has happened meanwhile,—I am leaving myself an escape hatch—from then on to say that the parties again under the contract had to agree on who this leading man would be, and had to exercise good faith on both their parts in trying to get together on a leading man. Because if they didn't get together on a leading man, then she couldn't be forced to perform.

The thing that is presently bothering me is this: If [582] it is true that Young is in there and approved until about July 11th—looking at paragraph 29: "if, because Artist does not approve any one or more of the items"—under that theory she had approved all of them. If because she didn't approve, "artist does not become obligated." Well, I think the artist was obligated. She couldn't avoid her approval of Young. Young could avoid it, but she couldn't; "and does not render any services pursuant hereto, then the producer is not required to pay her anything."

What were the dates on which she went down and participated in wardrobe fittings? Was that before July 11th?

Mr. Knupp: That was after. Of course, the court says she was bound. But I still am trying to make a point that she was no more bound than the studio was, because she was only bound in the event that Young approved the role. If Young didn't approve the role, and it was true from the very start if Young didn't approve the role, then

Miss Sheridan wasn't bound, because they had to get someone else to perform, and if Young did approve the role the studio was equally bound.

The parties were free in their actions with respect to the same contingency.

Mr. Gang: May I get in the act a moment? I know your Honor is doing a very good job on my side for the moment, and I hate to spoil it. [583]

The Court: Be careful.

Mr. Gang: I do so with some trepidation, except Mr. Knupp has forgotten a few things, which I am sure if reminded of he will concede. One, there is a stipulation that this was a valid contract. And you will remember we forced that stipulation as a condition for our dropping out our general damage action to avoid having the plaintiff get up in court here and say that there wasn't any contract binding the defendant. Your Honor remembers that. That was the condition on which that cause of action was dropped out, to avoid getting in this position.

Secondly, Mr. Knupp is laboring under a misapprehension as to Exhibit 2. This was not something that Miss Sheridan requested; this was something that the defendant requested. In other words, that escape clause is something that the defendant put in so that the defendant, even though Robert Young had been approved, that the defendant, whether Robert Young wanted to do it or not, could put anybody else in, and it wanted that right.

Lastly, and it seems to me most important, as far as that goes, the fact remains that the plaintiff not only was obligated to but did render services. As Mr. Rogell himself testified, as Mr. Sparks did,

there was nothing required of her under that contract which she did not do, until she was fired. [584]

And, as I have said before, the second sentence of paragraph 29 just does not operate unless your Honor rewrites it.

The Court: Of course, if this Robert Young situation had been one like this, supposing Young hadn't been in the package deal, and Miss Sheridan in signing the contract of April 29th had written a letter saying "And I approve Robert Young if you appoint him," then I think that would become sort of a continuing offer on her part, revocable any time before it was acted upon. She could have written a letter the next day and said "Yesterday I approved Robert Young; today I change my mind, I approve Charles Boyer," and again that would have been a continuing offer until the studio would have decided whether they were going to use him. But you don't have that situation. You have a situation where RKO bought what their own executives call a package deal, a deal in which there was a script, an outstanding actor and actress, Sheridan and Young; a producer, a director; a package; Young was part of that package. When Miss Sheridan signed that contract on April 29th, the contract itself provided that she approve the script as it then stood, and if final revisions didn't change it she was going to stand by her approval. But she had not done anything about the directors, she hadn't done anything about the actor. Now, the package deal didn't include a director; the package [585] deal did include an actor. In her letter of April 29th, Exhibit 2, she takes care of

the director situation. "This will confirm that I have approved and hereby approve any of the following individuals to act as the director of 'Carriage Entrance.' "

Was there any evidence who wrote this document?

Mr. Gang: Yes, the evidence is that that was prepared by the defendant.

The Court: By the studio?

Mr. Gang: Yes, and the notations on the upper left-hand corner are notations of the studio lawyers who drafted it.

The Court: It is apparent, therefore, that the studio picked out these three names, and she approved them.

"You shall not be obligated to assign any of these individuals to direct the picture, but any other individuals proposed by you * * * shall be subject to my approval."

Then she goes to the last paragraph:

"This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role * * *. You shall not be obligated to assign him * * *, but any other individual proposed by you * * * shall be subject to my approval."

It seems to me that that is not a continuing offer. It seems to me the parties' minds have met and they have agreed [586] upon Robert Young, and that she has complied with her contract on approval, subject to a defeasance which she may not have known about, and maybe the studio didn't think

about. There is an escape hatch in the letter, but whether they were thinking about that or not you can't tell, because they put the same escape hatch in as to the directors.

Anyhow, subject to a defeasance that Young might say "Well, I am not going to take the part." Well, when he did that, that would open the matter up again.

But I think this is different from a case where Miss Sheridan had made a continuing offer which she might have withdrawn.

I think she approved Young, and from the time of her approval on April 29th until the time that he exercised his right not to act, there was a contract between them to that extent, subject to it being avoided by his conduct.

Now, shake me on that, will you?

Mr. Knupp: Your Honor says he thinks there was a contract. It seems to me that there was a conditional agreement between the parties. I don't think there was any contract here, because both of the parties reserved the right not to perform.

Mr. Gang speaks of the escape hatch, which we put in the contract. But, after all, the escape hatch which caused the difficulty here is the one that Miss Sheridan put [587] in and which was put in for her benefit, that is, the right of approval.

If she had simply said in that contract, "I will approve Robert Young, but you don't have to appoint him and you can appoint somebody else," and it quit there, I would agree with your Honor that then the studio if it couldn't get Robert Young to

perform was obligated to get somebody else in good faith to take the role.

But the studio couldn't go beyond attempting to appoint somebody that Miss Sheridan would approve, and certainly Miss Sheridan never became obligated to perform this contract. There couldn't be any performance under it until you had a leading man, and the last thing required in the selection of a leading man was the approval of Miss Sheridan.

You never had any agreement under which the picture could be produced until there was a leading man who had been definitely approved by Miss Sheridan.

Now, that is the situation. You didn't have a contract where the parties could go ahead and perform, because both of them still were in a situation where they knew that Robert Young was only named provisionally, and that provision was that he should approve and should agree to perform.

The Court: There is nothing in the contract that says that Robert Young shall approve before Miss Sheridan is bound.

Mr. Knupp: No, but the contract does say that they don't [588] have to appoint him, and I think the evidence is clear enough that the reason that was put in is because the contract between Young and RKO expressly required his approval.

If RKO had bound itself to secure the services of Young, which it didn't do under this contract, but which it might have done in this contract with Miss Sheridan, then when she said she approved, and they said nothing about reserving a right, I

would agree that your Honor was entirely correct. But when the parties contracted having a specific situation in contemplation, and both of them knowing that they might not be bound unless those events occurred, namely, that Young approved this contract, or unless somebody else was appointed that Miss Sheridan did approve, then it seems clear to me, if the court please, that the contract—while Mr. Gang says there was an understanding and agreement that they had a valid contract, I am not questioning that, there is no question but what they did have a contract, the only question is as to when the parties became bound to perform their services under the contract—both of them undoubtedly contemplated when they entered into the agreement that a leading man would be appointed, and if Young didn't approve that somebody else would be appointed and that Miss Sheridan would approve such a man. So it seems to me that the court is taking a very limited view of what the provisions of this contract are. [589]

It really isn't a question of a defeasance at all; it is a question very plainly on the face of it, to me, as to whether the parties became bound to perform, and I think that gets back entirely to the question of good faith.

The Court: In other words, if the studio had wanted to use Young, and he had considered, could they have thrown Young into the picture and started a picture without ever requiring anything further from Miss Sheridan?

Mr. Knupp: I don't think there is any question

about it; I think they were bound to try to get Young. But I think if they had gotten Young, that would have been the end of it.

The Court: The point is supposing they had gotten Young and supposing his contract didn't have this clause in it that he could crawl out on, once they had put Young in and started to make a picture, nothing further was required on Miss Sheridan's part, she didn't have to sign anything more.

Mr. Knupp: No. But the studio did have to get Young to perform the part before Miss Sheridan was bound, that is the proposition.

The Court: Now you are getting down to, although you don't call it that, an argument on mutuality, whether one person can be bound by an agreement if the other person isn't bound. But I don't think we are going to get anywhere [590] on a mutuality argument. I haven't considered it so far for the reason that you have got an entirely different kind of a contract. You have a contract, to start with, on April 29th, that does a certain amount of binding, then you have things happen thereafter. True, if you had a contract spelled out in simple terms where one person was bound, and the other one wasn't, you wouldn't have mutuality, and you probably wouldn't have a valid contract. But where a contract binds a person in certain ways, and binds the other fellow in certain ways, and then you have a particular clause that may lack mutuality, I don't think that the lack of mutuality in one clause of a contract or one part of a contract vitiates the contract. It is entirely

possible that Miss Sheridan would have been bound from April 29th by her approval of Young, and yet the studio not be bound until they finally decided whether they were going to use Young or not.

Mr. Knupp: I don't think there is any question of mutuality involved in this situation at all, if the court please. I think the parties were mutually bound. I think the studio was bound to use its best efforts to get Young; I think the evidence shows that it did. I think Miss Sheridan was bound if the studio couldn't get Young, to use good faith in approving somebody that they did appoint.

I don't think there is any lack of mutuality. The parties [591] agreed impliedly, at least. The studio agreed it would use its best efforts to get Young. It didn't say maybe it couldn't but it would use its best efforts, but that is the implication.

Miss Sheridan said to them in good faith, "If you can't get Young after acting in good faith, I will approve somebody or disapprove if you can't get somebody I approve, at least I will exercise good faith, both of us will exercise good faith in trying to get this leading man."

I don't see that there is any mutuality or lack of mutuality if you take into consideration the implied covenants of this agreement, if the court please.

The Court: What services, if any, do you contend that Miss Sheridan rendered before July 11th?

Mr. Gang: Are you speaking to me, your Honor?

The Court: Yes.

Mr. Gang: Let's go even beyond services and take the word "obligated" also, because there are two phrases.

From April 29th on, from the time that she approved the three items on which she had approval, Miss Sheridan was obligated under the contract so that she could not during the period of time from thence on, expiring 15 weeks after July 6th, which was the last date on which her term of employment was to start, she could not have made a commitment with anybody else. She blocked herself out of the market, and her [592] market value was \$150,000 a picture. She was out of the market during that time. And there isn't any question that the reason why the studio got Miss Sheridan to sign Exhibit 2 was to have a commitment, so they could hire writers, go ahead and work and be ready to make a picture. They wouldn't have signed that contract without having her approval on April 29th any more than they would have settled the law suit.

There isn't any question that on April 29th Miss Sheridan was obligated so that she could have been enjoined from a breach of that contract. And nothing has been said here that will in any way vitiate that position.

Secondly, with reference to the rendition of services, she was only required to render services, as distinguished from an obligation, beginning with the term of employment which was the last day it could start, July 6th. From that time on every time she came to the studio at the request of the defendant she was rendering services, and the rec-

ord is quite clear she came numerous times. The services between July 6th and July 11th consisted of talking about the script. As a matter of fact, the very first meeting was about the script, and the discussion at that time was that Miss Sheridan was worried that the defendant in rewriting the script which had been approved by Mr. Young, according to the evidence here, had minimized his part so she was [593] afraid he wouldn't O.K. it. And that is just what happened. So she was rendering services in discussing the script before Mr. Young refused. After Mr. Young refused, she continued to render services in great detail. She talked to the make-up man, she talked to the designer, she spent a day having designs fitted, she did everything that she had to do, in addition to the efforts she was rendering to assist in the finding of a suitable replacement.

So, as far as she is concerned, not only was she obligated, but she did everything that was required of her that she could have been asked to do under the contract.

She wasn't doing it in a vacuum, but under a written agreement under which she was bound.

This is uncontradicted evidence. There isn't any room here for argument about this. This is in the record from the witnesses produced by the defendants themselves.

I submit that unless you rewrite the second sentence of paragraph 29 you just cannot operate on the facts as they are in this record.

Mr. Knupp: If the court please, just one more

thing. Mr. Gang says that Miss Sheridan was obligated from April 29th.

She was no more obligated than the studio was. The studio was obligated to try to get Robert Young into this part, or put somebody else in. And if the studio hadn't exercised some [594] good faith in that endeavor, I have no doubt that Miss Sheridan could have held the studio for damages.

The parties here had the same kind of contract. The obligations on the one side were just the same as on the other. There were certain obligations that weren't spelled out, but the law spells them out by the requirement that good faith be exercised.

I don't think there is any question, if the court please, but just exactly to the same extent and the same way each party was bound under this contract.

Mr. Gang: I hope we haven't confused the distinction between the motion on the counter-claim and the other one.

The Court: No. I have them in mind. I am just thinking, as I told you at the pre-trial. It bothers me whether I am making an easy problem difficult. I want to think about this a little bit.

Do you want to work some time on instructions this evening?

Mr. Knupp: Whatever the court likes.

The Court: Let's take a recess until about a quarter to four. Shall we meet here in court or in chambers, and go over these instructions?

Mr. Knupp: I would like to meet in your chambers, if the court please. It is a little easier, I think.

The Court: The motions will be taken under

submission [595] and maybe we will rule on them and maybe we won't.

Any other motions?

Mr. Gang: No, your Honor.

(A short recess was taken.)

(Whereupon the following proceedings took place in the chambers of the court in the absence of the jury:) [596]

* * *

“Counsel met with the court in chambers in the absence of the jury for the purpose of considering the instructions of the court to the jury. Instructions tendered by the plaintiff and instructions tendered by the court were read and arguments of the parties with respect to such instructions heard by the court and considered. At the conclusion of such hearing the court announced that it would give none of the instructions tendered by the plaintiff except that plaintiff's requested instruction No. 10 would be given as modified by the court and that the court would give none of the instructions requested by defendant except that it would give instruction No. 4 requested by defendant. The court stated to counsel that the court had prepared its own instructions to the jury and delivered said instructions to counsel. Each of such instructions to which objections were made or exceptions taken is identified by the letters set forth in the reporter's transcript of proceedings. The court's instructions were

considered and the arguments of counsel with respect thereto heard and considered and the court requested counsel to make any objections or take any exceptions which counsel had to the court's instructions or to the refusal of the court to give the instructions requested by the parties." [597]

Tuesday, February 6, 1951. 9:30 A.M.

(The following proceedings were had in the chambers of the court, in the absence of the jury:)

The Court: We are assembled here to talk about objections to the instructions which the court has proposed to give. The record already shows the form instructions that the court is going to give, and for the purpose of summary they are the court's instructions: 1, 2, 2-A, 3, 4, 4-A, 5, 6, 6-A, 7 with a correction as previously indicated, 8, 9, 10, 15, 16, 18, 19, 20, and 20-A.

Then we have a series of instructions which for reference I have called the court's A, B, C, and so forth. Now, what do you have to say?

Mr. Knupp: At this time, if the court please, the defendant objects to the giving of the following instructions to the jury, upon the following grounds:

And I have numbered these, Mr. Reporter, so as to indicate the number of my objections.

(1) The court's instruction A, upon the ground that it states an erroneous legal proposition, and upon the ground that the contract of April 29, 1949,

Plaintiff's Exhibit 1, provides that the artist, plaintiff, shall not be required to render any services pursuant to the contract unless and until she has approved the actor who will portray the [669] leading male role in "Carriage Entrance," and that plaintiff never approved the actor who would portray said leading male role, in that the written approval of Robert Young was qualified by the condition that defendant need not assign him to portray the leading male role in the picture, and that any other individual proposed by defendant to portray the leading male role in the picture should be subject to the approval by plaintiff as provided in Article 1 of said agreement; that Robert Young refused to portray the leading male role in the picture and did not portray said role, or ever become the person who would portray said role; that instruction A assumes that Robert Young was approved as the person who would portray the said role and is contrary to the fact; that, in fact, plaintiff never approved any other actor who would portray the leading male role in the picture, and the instruction assumes a fact that is contrary to the evidence. And upon the ground that the plaintiff never became obligated to nor rendered services pursuant to the contract.

(2) Court's instruction B, upon all of the grounds assigned for the objection to court's instruction A, and upon the ground that said instruction assumes that plaintiff did obligate herself to render services under the contract by her approval of Robert Young on April 29, 1949.

(3) Court's instruction G, upon the ground that the instruction fails to take into consideration that entirely [670] apart from paragraph 29 plaintiff never became obligated to render her services under the contract, because she never approved the actor who would portray the leading male role in "Carriage Entrance," and said instruction does not present this essential part of the case.

(4) Court's instruction H-1, upon all of the grounds assigned for the objection to court's instruction A, and upon the further ground that contrary to the fact the jury is thereby instructed that plaintiff on April 29, 1949 approved Robert Young as the actor for the leading male role, in the film play, and as the actor who would portray the leading male role in said film play, and that plaintiff by said approval of Robert Young became bound to render services pursuant to the contract. And upon the further ground that the court thereby instructed the jury that the sole issue to be decided by the jury was, Did the plaintiff render any services to defendant pursuant to the contract and prior to termination on August 17, 1949; and instructed the jury that if the answer to such question was in the affirmative the verdict of the jury must be for plaintiff. And upon the ground that the evidence shows that plaintiff rendered no services pursuant to the contract prior to the refusal of Robert Young to portray the leading male role in the picture, or at any time thereafter. And upon the further ground that the jury is thereby instructed that if plaintiff

rendered [671] any services pursuant to the contract subsequent to April 29, 1949, and prior to August 17, 1949, plaintiff is entitled to recover without regard to whether plaintiff ever approved any actor who would portray the leading male role after Robert Young refused to perform said role, and that such instruction is erroneous under the law and contrary to the provisions of the contract.

(5) Court's instruction J-1, upon all the grounds assigned for the objection to court's instruction A, and upon all of the grounds assigned for the objection to court's instruction H-1.

(6) Court's instruction L, upon the ground that said instruction fails to state that if in good faith defendant proposed an actor to portray the leading male role in the picture, and the plaintiff failed to approve said actor after reasonable opportunity so to do, plaintiff never became obligated to render her services pursuant to the contract and could not recover in the action.

(7) Court's instruction P, upon all of the grounds assigned for the objection to court's instruction A, and upon all of the grounds assigned for the objection to court's instruction H-1.

(8) Court's instruction Q, upon all of the grounds assigned for the objection to court's instruction A, and court's instruction H-1. [672]

(9) Defendant likewise objects to the failure of the court to give the following instructions requested by defendant, upon the following grounds:

Defendant's proposed instruction No. 1, upon the ground that the court failed to instruct the jury that the plaintiff prior to the termination of her employment failed to approve an actor to portray the leading male role in the picture, but on the contrary instructed the jury that the plaintiff had approved Robert Young for such role and thereby became obligated to render her services pursuant to the contract, and that such an instruction embodies an erroneous conclusion of law and an erroneous interpretation and construction of the terms of the agreement between the parties.

(10) Defendant's requested instruction 2, on the ground that under the terms of the contract the approval by plaintiff of Robert Young on April 29th was not and did not obligate plaintiff to render her services under the contract.

(11) Defendant's instruction 5, upon the ground that said instruction is a correct statement of the law, material to the consideration of the issues of fact, and is not covered by any instruction given by the court.

(12) —

The Court: Just a moment. What was that last one?

Mr. Knupp: The last one was 5.

The Court: Read that last point. [673]

(The record was read by the reporter.)

Mr. Knupp: And I would like to add to that: And is a correct construction and interpretation of

the provisions of the contract between the parties.

The Court: Go ahead.

Mr. Knupp: Now, Mr. Reporter, as Nos. 12, 13 and 14, I would like to repeat the same statement with respect to defendant's proposed instructions 6, 7, and 8. Would you just insert in your notes—I suppose it may be assumed—that we have made the same objection to the failure to give defendant's proposed instructions 6, 7 and 8 as the objection which we made to the failure of the court to give defendant's proposed instruction 5.

I suppose the record can show that without us reading it again into the record.

The Court: That's right. I think it is clear enough what your objection is, just as it stands there.

The objections will be each and all denied, overruled, and you have your exception automatically.

Now, Mr. Gang.

Mr. Gang: Mine will be much shorter and simpler. I won't repeat the objections made before, those are in the pre-trial record, having to do with the court's ruling adverse to plaintiff's contentions.

The Court: You incorporate those by reference here? [674]

Mr. Gang: Yes, if your Honor permits.

I will limit myself now to the two main points in which your Honor still differs from me. One is that under the uncontradicted evidence paragraph 29 never became operative, either as to the first sentence or second sentence, because on the uncontradicted facts the plaintiff did approve an actor to

play the leading male role, and did render services.

Next, to the adoption by the court of the position of the defendant that it was not necessary for the defendant to make any unequivocal selection of a named actor to substitute for Robert Young after he became unavailable, and the adoption by the court of the defendant's position that having discussed actors whom the defendant indicated might be satisfactory to defendant, it was thereafter a futile act for defendant to notify plaintiff that it had selected a named actor even though plaintiff had indicated prior thereto that in her opinion any such named actor was not suitable for the part.

And in that regard, I had prepared three questions of fact to be decided by the jury if the court had ruled in accordance with our position, assuming of course that the jury did not find in accordance with the court's instruction that the plaintiff was entitled to a verdict with reference to paragraph 29. And these three questions which would have had to be answered by the jury, if our conception [675] and interpretation of the procedure under the contract had been followed, are the following:

I hand a copy to the court. I gave one to Mr. Knupp yesterday.

(1) Did the defendant make a final designation of a named actor to portray the leading male role in "Carriage Entrance" after Robert Young refused to play the part?

Yes and no is provided.

If your answer is "No" the other questions need not be answered.

(2) Did the defendant, if it did make a final designation of a named actor to portray the leading male role in place of Robert Young, notify plaintiff unequivocally thereof so as to afford plaintiff a reasonable opportunity to approve such named actor?

Yes and no is provided.

If your answer is "No" the next question need not be answered.

(3) If defendant did make a final designation of a named actor to portray the leading male role in "Carriage Entrance" in place of Robert Young and if defendant did notify plaintiff thereof and did afford plaintiff a reasonable opportunity [676] to approve thereof, did defendant make such final designation in good faith?

Yes and no is provided.

The Court: That was included in one of your instructions, very similar instructions.

Mr. Gang: Yes, the gist of it.

Those are the only objections we urge now, in addition to those we urged heretofore.

The Court: The objections are each overruled and denied.

In answer to your instructions, particularly making the request along the line of the three questions that you ask, the court has instructed the jury, and they have in evidence before them the contract and

the letter, and you may argue as to what your interpretation of the contract is and what should have been done. But my instruction that I have given differs from what you have requested in that I have taken the position that the law doesn't require anybody to do an idle act, and because of the conversations between the parties, statements made back and forth, I don't think any further formality was required. However, your exceptions are duly noted.

Anything further?

Mr. Knupp: That is all I have, if the court please.

Mr. Gang: That is all.

The Court: I am going to give plaintiff's instruction 10 [677] with some minor changes, and I am going to insert in line 6 the following:

"The deposition of Howard Hughes was heretofore taken before a notary public by the plaintiff and was thereafter written up and is available to the plaintiff. However, the Federal Rules of Civil Procedure permit the plaintiff to call an officer of a party defendant as an adverse witness under Rule 43(b), and to examine him as upon cross-examination. The fact that a deposition has been taken does not deprive a party of this right. However, where the witness is unavailable, the deposition ordinarily may be used."

Then I will go ahead with the rest of 10 as submitted.

(Thereupon the proceedings were resumed in

open court within the hearing and in the presence of the jury:)

The Clerk: No. 10585-C, Ann Sheridan v. RKO Radio Pictures, further trial.

The Court: The record will show that counsel for both parties are in court, and the jury are present and in their proper places.

Now we are ready to proceed with the argument.

Your estimates, gentlemen, still remain about the same?

Mr. Gang: Shorter. [678]

Mr. Knupp: Yes, I think that is so. I don't think the arguments of both sides will take much more than an hour.

The Court: You may divide your argument, Mr. Gang, as you see fit, and Mr. Knupp may have as much time in toto as you take for your two arguments. Is that satisfactory?

Mr. Gang: Perfectly.

The Court: All right, Mr. Gang.

(Whereupon the case was argued to the jury on behalf of plaintiff and defendant by counsel for the respective parties, which argument was reported by the court reporter, but at the request of counsel was not transcribed.)

The Court: Before I instruct you as to the law, we will take a short recess.

The court again admonishes you that the case has not yet been submitted to you for your decision, so you are not to converse or otherwise communicate among yourselves or with anyone upon any subject touching the merits of the cause, and you are not

to form or express an opinion on the case until it is finally submitted to you for your verdict.

We will take a short recess. The jury may retire. Court will remain in session.

(The following proceedings were had in the absence of the jury:) [679]

The Court: The record will show that the jury is absent.

Have counsel looked over these forms of verdict?

Mr. Knupp: They were just handed to us, if the court please.

The Court: Here, Mr. Gang, you may look at the originals. Don't fill in any names on the originals, though, Mr. Gang.

Counsel, with reference to the instructions, while the argument was proceeding, I have been thinking about this instruction on Section 29. I don't think it makes any difference, in so far as the objections you have heretofore made, but I think I will read the whole of Section 29.

Mr. Knupp: We would make the same objection, if the court please. I don't think the objection went particularly to the fact that the court only proposed to refer to part of it.

The Court: I don't think it will vary your objections. You still have your objections available. I will read the whole of Section 29, and then call the attention of the jury that I have interpreted the words "minimum compensation" to mean \$50,000.

We will take a short recess.

(A recess was taken.) [680]

(Whereupon the proceedings were resumed within the presence of the jury as follows:)

The Court: The record will show that the jury is present and in their proper places.

Mr. Gang: So stipulated.

COURT'S INSTRUCTIONS TO JURY

The Court: Members of the jury: You have heard the evidence and the argument. Now it is the duty of the court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Ann Sheridan, and the answer thereto of the defendant RKO Radio Pictures, Inc.; and the counter-claim of RKO Radio Pictures, Inc., and the answer of Ann [681] Sheridan thereto. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy.

prejudice, or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations, stand equal before the law.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his case by a preponderance of the evidence; and if the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth.

Evidence may be either direct or indirect. [682] Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, even though true, does not itself conclusively establish the fact in question, but which affords an inference or presumption of

the existence of such fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved. A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless so outweighed, the jury are bound to find in accordance with the presumption.

Unless and until outweighed by evidence to the contrary, the law presumes that private transactions have been fair and regular; that the ordinary course of business has been followed; and that the law has been obeyed.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved. [683]

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case.

But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner [684] in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollections, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider

whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule exists in the case of an expert witness. A witness who by education and experience has become expert in any art, science or profession, may state his opinions as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; [685] and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

A witness may be discredited or impeached by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony

of that witness or give it such credibility as you may think it deserves.

While the burden rests upon the party who asserts the affirmative of an issue to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that the probability of truth on such issue favors that party. [686]

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

The testimony is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after

weighing all the evidence in the case, you believe that the balance of probability points to the accuracy and honesty of the one witness.

(COURT'S INSTRUCTION A)

The plaintiff, Ann Sheridan, is a motion picture actress and the defendant, RKO Radio Pictures, Inc., is a corporation engaged in the production and distribution of motion pictures. According to the undisputed testimony defendant, RKO, took over from Polan Banks what was termed a "package deal." This included the story and script for "Carriage Entrance," the producer, Banks, the artist for the leading female role, Ann Sheridan, and the actor for the male leading role, Robert Young. RKO took over this package deal in settlement [687] of litigation between itself and Polan Banks. On April 29, 1949, the plaintiff and the defendant entered into the contract which has been received in evidence as Exhibit No. 1, under which the plaintiff agreed to render her services as an actress in the leading female role in a motion picture to be produced by the defendant entitled "Carriage Entrance" and defendant agreed to employ plaintiff as such actress. The plaintiff was not required to render any services pursuant to the contract unless and until she had approved:

(a) The final shooting script of the screen play for "Carriage Entrance."

(b) The director who would direct "Carriage Entrance."

(c) The actor who would portray the leading male role in "Carriage Entrance."

There is no dispute between the parties with respect to the approval by the plaintiff of the final shooting script of the screen play for "Carriage Entrance" or the director who would direct the picture. This action presents the question as to whether plaintiff, prior to the termination of her employment by defendant, after approving Robert Young as an actor to portray the leading male role, rendered services to defendant RKO; questions as to the good faith of the respective parties in their dealings concerning the actor for said leading male role after Young's refusal of the part; and the questions presented by defendant's [688] Counter-Claim.

(COURT'S INSTRUCTION B)

On the same day that the contract was entered into, April 29, 1949, plaintiff in writing, Exhibit No. 2, approved Robert Young to portray the leading male role in the picture. This writing was drawn by defendant and also provides that defendant need not assign Robert Young to the picture but that any other individual proposed by defendant to portray the role should be subject to the approval of plaintiff as set forth in the employment contract. Robert Young was, on April 29, 1949, required under a written contract with defendant to render his services in one motion picture to be produced by defendant and based upon a story which should be approved by Robert Young. The defend-

ant submitted the screen play for "Carriage Entrance" to Robert Young about July 7th, 1949, and Young refused on July 11, 1949, to approve such screen play or to render his services in portraying the leading male role in the motion picture. Accordingly, you are instructed that after approval by plaintiff of Robert Young, and after plaintiff did obligate herself on April 29, 1949, to render her services in the picture, nevertheless, Young's refusal on July 11th, 1949, to perform the part, made it necessary for the parties to again agree on an actor for the leading male role, before production could start on the picture.

(COURT'S INSTRUCTION C)

The plaintiff alleges in her complaint that the act of [689] the defendant terminating the contract by the written notice of August 17, 1949, was "wrongful, without cause, was taken in bad faith, was arbitrary and unreasonable and constituted a breach of contract by defendant, RKO."

This allegation the defendant denies in its answer.

(COURT'S INSTRUCTION E)

The defendant, RKO, has also filed a counter-claim against the plaintiff, Ann Sheridan, in which it charges her generally with bad faith in connection with the dealings concerning the approval of an actor for the leading male role. About this counter-claim I will instruct you more in detail hereafter.

(COURT'S INSTRUCTION D-1)

Section 29 of the contract, which is Exhibit 1, reads as follows:

Sometimes it is referred to as section 29 and sometimes as paragraph 29:

"Producer shall not be required to use Artist's services hereunder or to complete the production of "Carirage Entrance," and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder."

Let me interpolate at that point that as a matter of law I have construed the contract to mean that the words "minimum compensation" mean the sum of \$50,000.

The section now proceeds: [690]

"However, if, because Artist does not approve any one or more of the items specified in paragraph 1,"

Interpolating, which are the script, director, and the leading male role.

"Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

(COURT'S INSTRUCTION F)

It is conceded by both parties that if plaintiff is entitled to recover, your verdict in her behalf, under the terms of the contract, shall be for the sum of \$50,000, and for the additional sum of \$5,162.42 as

interest on said \$50,000 from August 17, 1949, to date.

(COURT'S INSTRUCTION G)

The case therefore breaks itself down into three parts:

(1) Issues arising under paragraph 29 of the contract.

(2) The general question of the good faith of plaintiff and defendant in their dealings, one with the other in connection with the approval of an actor for the leading male role, and

(3) The issues presented by the counter-claim.

(COURT'S INSTRUCTION I-1)

You are instructed that the contract, paragraph 12, further provided that if the term of the artist's employment began later than June 1, 1949, that the artist agreed to [691] report to producer's studio or elsewhere, when and as directed by the producer during the period (not exceeding, however, one week) prior to the starting date of said term, and to appear, assist and take part in tests, wardrobe fittings, conferences, public interviews, services, still photos and the like, in connection with "Carriage Entrance."

You are further instructed that paragraph 4 of the contract provided that the term of the artist's employment was to start on such date as the producer might specify in writing, but such date, however, was not to be later than July 6, 1949.

In considering whether or not plaintiff rendered

services to the defendant RKO as mentioned in the next instruction, you may consider the provisions of the contract above referred to in reaching your determination.

(COURT'S INSTRUCTION H-1)

The court instructs you that Ann Sheridan, on April 29, 1949, approved Robert Young as the actor for the leading male role in the film play, pursuant to the contract, and that she thereby became bound to render her services to the defendant.

Since there is no issue to be decided by you as to the approval of the script or the director by the plaintiff, Ann Sheridan, the sole issue which you must decide arising under paragraph 29 of the contract is as follows:

(1) Did Ann Sheridan render any services to the [692] defendant RKO, pursuant to the contract and prior to its termination on August 17, 1949?

If you answer this question in the affirmative, then your verdict must be for the plaintiff on her complaint in the sum of \$50,000 plus \$5,162.42 interest.

(COURT'S INSTRUCTION J-1)

If your answer to the foregoing question is in the affirmative and you arrive at a verdict for the plaintiff, then you need consider no further issues in this case.

If your answer to the foregoing question is in the negative and you do not arrive at your verdict, then you must consider the second phase of the case,

namely, the question of the good faith of the parties in their dealings one with the other, in attempting to arrive at an agreement on an actor to play the leading male role in place of Robert Young.

(COURT'S INSTRUCTION K)

In every contract there is an implied covenant of good faith, and fair dealing; and in the contract between the plaintiff and defendant this implied covenant required that defendant should in good faith propose to plaintiff for the leading role in the picture the names of actors who were competent and qualified to portray such role, and with the intent on the part of defendant to assign to the role any one of such actors who was approved by plaintiff; and on the part of plaintiff, the implied covenant was that in refusing to approve any person that defendant proposed plaintiff would [693] act in good faith and would base such refusal upon some reasonable, sensible objection.

(COURT'S INSTRUCTION L)

After Robert Young refused to play the leading male role, it became necessary for the plaintiff, Ann Sheridan, and the defendant, RKO, to agree on a new male lead before the production could continue.

The procedure contemplated by the contract, Exhibit No. 1, and the letter, Exhibit No. 2, which defendant prepared for Miss Sheridan's signature, was as follows:

That if Young was not used by the defendant in the film play, then RKO would propose an actor

for the leading male role and Miss Sheridan would then approve or reject this actor. Under the agreement between the parties she had the right to approve or reject the proposed actor.

In substance, this amounted to simply this: That Ann Sheridan and RKO, under the agreement, had to come to an agreement or a meeting of the minds on the actor for the leading male role.

The plaintiff had no right or voice in the selection of an actor to portray the leading male role in the picture. She could only approve or disapprove any actor selected by the defendant. The matter of selection of an actor for the role was exclusively the right of defendant and the defendant fully complied with its obligation under the contract if it proposed, in good faith, to assign to the role a competent [694] and qualified actor of recognized standing and reputation in the motion picture industry and one suited for the leading male role in the picture. It is not material that defendant did not actually assign any actor to portray the leading male if the plaintiff by her statements or conduct plainly indicated that she would not approve such actor if he were assigned to the role.

(COURT'S INSTRUCTION M)

It is not important how or in what manner names of actors for this role were proposed or what formality was used. RKO would not need to make a formal proposal in writing or otherwise, as to the

name of an actor which Miss Sheridan had orally rejected. The law does not require the doing of an idle act.

(COURT'S INSTRUCTION N)

At any rate, the parties never got together on a new actor for the leading male role, and so we are now concerned with whether or not either or both of the parties acted or failed to act in good faith in their dealings.

If you find that defendant, RKO, in its dealings with Ann Sheridan on this matter of filling the leading male role, was motivated by and acted in bad faith, then this would constitute a breach of contract by the defendant and your verdict in such event would be for the plaintiff in the sum of \$50,000 plus interest in the sum of \$5,162.42, and this verdict would follow from your finding of bad faith on the part of the defendant. [695]

(COURT'S INSTRUCTION P)

If you find that Miss Sheridan in her dealings with RKO on this matter of filling the male lead was motivated by and acted in bad faith, then your verdict must be against Miss Sheridan on her complaint and must be a verdict that she take nothing by her complaint, unless you find that she is entitled to your verdict under my previous instructions.

(COURT'S INSTRUCTION Q)

If you find that both parties in their dealings concerning the filling of the leading male role, were

motivated by and were acting in good faith in such dealings, then your verdict must be against Miss Sheridan on her complaint and must provide that she take nothing by that complaint unless she is entitled to recover under my previous instructions.

When I talk about "my previous instructions" I am talking about the instructions concerning section 29 of the contract.

(COURT'S INSTRUCTION R)

Defendant's counter-claim: Defendant RKO has filed a counter-claim and offered proof thereon. It alleges that after the execution of the contract, RKO made preparations for the production of the film play and employed various persons upon the assumption that plaintiff would play the leading female role in the film play.

Defendant RKO alleges that plaintiff Sheridan, arbitrarily, capriciously, unreasonably and without cause or justification refused to approve any actor for the leading male role that was proposed by defendant. [696]

Defendant claims costs, expenses and money expended in the sum of \$72,686.39 and seeks judgment against plaintiff in that amount.

(COURT'S INSTRUCTION S)

I have previously instructed you that every contract contains the implied covenant of good faith and fair dealing.

After Robert Young refused the male lead, Miss Sheridan, under the agreement of the parties, had

the right of approval or disapproval of any actor proposed by defendant for the leading male role.

It would be only in the case of bad faith on the part of the plaintiff, Miss Sheridan, in her dealings with the defendant, that she could be liable on the counter-claim. If, in good faith, she made her rejections of male actors proposed by the defendant, then there is no liability on the plaintiff even though some damage may have been suffered by the defendant.

If, on the other hand, you find bad faith on Miss Sheridan's part in her dealings with the defendant RKO concerning the actor for the leading male role then and in that event only is defendant entitled to a verdict on its counter-claim.

In that event you will determine what amount, not exceeding \$72,686.39, will fairly compensate the defendant for the damage, if any, suffered by the defendant as alleged.

(COURT'S INSTRUCTION T)

Good faith is difficult to define, but essentially it [697] means fair dealing and it concerns the mental attitude of the party involved. It concerns his desires and intentions. A person may be stubborn, arbitrary or dogmatic in his actions in connection with whether or not he should or should not do a certain thing or refrain from doing a certain thing, but such matters are not necessarily actions in bad faith. Bad faith carries a sinister or wrongful connotation, such as doing the unfair or the unjust thing.

Examples may assist you in this matter. If you find, for instance, that Miss Sheridan deliberately refused to approve an actor for the leading male role because she was motivated by the desires and intention that the production of the film play should be stretched out, and that as a result thereof she would receive \$10,000 per week for weeks in excess of the first 15 weeks of production, then any act she did when so motivated was in bad faith.

By the same token, if you should find the defendant RKO, in refusing to propose or approve as an actor for the leading male role any of the ones suggested by Miss Sheridan was motivated by the desire to prevent Miss Sheridan from acting in the film play "Carriage Entrance" and to deprive her of her contract and the compensation thereunder, then any act done by RKO with that motive would be an act in bad faith. Or if you should find that RKO, for instance, had the intention of using Robert Mitchum in the film play, but kept this intention [698] secret until after its notice of termination of contract was sent to Miss Sheridan and then placed Robert Mitchum in the film play, such action by RKO with such motivation would be in bad faith.

During the course of the trial, at a time when the jury was not in the court room, plaintiff requested the court to make an order requiring the defendant to produce Howard Hughes in order that the plaintiff might have an opportunity to question Mr. Hughes as an adverse witness.

The deposition of Howard Hughes was hereto-

fore taken before a notary public by the plaintiff, and was thereafter written up and is available to the plaintiff. However, the Federal Rules of Civil Procedure permit the plaintiff to call an officer of a party defendant as an adverse witness under Rule 43(b), and to examine him as upon cross-examination. The fact that a deposition has been taken does not deprive a party of this right. However, where the witness is unavailable, the deposition ordinarily may be used.

The court granted the request made by the plaintiff and made such an order for the appearance of Mr. Hughes. However, despite this order, defendant has failed to produce Mr. Hughes as a witness. The parties have stipulated that it is a fact that Mr. Hughes is an officer of the defendant, holding the position of Managing Director-Production, and in that capacity is in charge of the production of motion [699] pictures by the defendant. The witnesses, who are or were officers or employees of the defendant, have all testified that Mr. Hughes was their ultimate superior.

When I made the order requiring defendant to produce Mr. Hughes as a witness in order that the plaintiff might question him, I cautioned the defendant that unless Mr. Hughes was produced, I would instruct the jury that they could infer by reason of Mr. Hughes' failure to testify that his testimony would have been adverse to the defendant's case.

Nevertheless, defendant has failed to produce Mr. Hughes. Therefore, in determining this case,

you may consider the fact that Howard Hughes did not take the stand and testify. While Mr. Hughes' failure to testify cannot properly be held to supply any fact not reasonably supported by the evidence in the case, you may infer from his failure to testify that if his testimony was given, it would have been unfavorable to the defendant and favorable to the plaintiff.

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then [700] fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial

consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the jury room, to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may [701] become involved, and the juror may later hesitate to recede from an announced position even when shown it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. But bear in mind you are not to reveal to the court or to any person how the jury stand, numerically or otherwise, until you have reached an unanimous verdict.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience.

Four forms of verdict have been prepared. Two of them are verdicts on the complaint, and two of them are verdicts on the counter-claim. I will read the two verdicts on the complaint:

“Verdict on the Complaint

“We, the jury in the above-entitled cause, find in favor of the plaintiff, Ann Sheridan, and against the defendant, RKO Radio Pictures, Inc., [702] a Delaware corporation, on the complaint herein, and assess the damages against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00) principal, together with interest in the sum of Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$5,162.42), making a total of Fifty-Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$55,162.42).

“Dated: Los Angeles, California, February ..., 1951.

“.....,

“Foreman of the Jury.”

That is in the event you find for the plaintiff on the complaint.

In the event you find for the defendant on the complaint, the verdict reads as follows:

“Verdict on the Complaint

“We, the jury in the above-entitled cause, find in favor of the defendant, RKO Radio Pictures, Inc., a Delaware corporation, and against the plaintiff, Ann Sheridan, on the complaint herein.

“Dated: Los Angeles, California, [703] February .., 1951.

“.....,

“Foreman of the Jury.”

Now,

“Verdict on the Counter-Claim.

“We, the jury in the above-entitled cause, find in favor of the defendant, RKO Radio Pictures, Inc., a Delaware corporation, and against the plaintiff, Ann Sheridan, on the counter-claim herein, and assess the damages against the plaintiff in the sum of Dollars (\$.....).

“Dated: Los Angeles, California, February .., 1951.

“.....,

“Foreman of the Jury.”

And then the alternative

“Verdict on the Counter-Claim.

“We, the jury in the above-entitled cause, find in favor of the plaintiff, Ann Sheridan, and against the defendant, RKO Radio Pictures, Inc., a Delaware corporation, on the counter-claim herein.

“Dated: Los Angeles, California, February
.., 1951.

“

“Foreman of the Jury.” [704]

You will take these forms to the jury room and when you have reached unanimous agreement as to your verdict, you will have you foreman fill in, date and sign the form which sets forth the verdict upon which you agree; and then you will return with your verdict to the court room.

It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

Will counsel approach the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

The Court: Mr. Knupp?

Mr. Knupp: At this time, if the court please, the defendant would like to object to the instructions given by the court as to each and every instruction indicated by the record heretofore prepared, and upon all the grounds which have been indicated in that record.

I would like, also, at this time, if the court please, to object to the instruction which was given with respect to the inference to be drawn from the testi-

mony of Mr. Hughes, the failure of Mr. Hughes to testify, on the ground that it is not a correct statement of the law. [705]

I don't understand that I have precluded myself from that.

The Court: You didn't object to it in there, but you have a right to object to it now. Except the purpose of your objection now is to permit the court to correct any error that may have dropped into the instructions.

In what way do you contend that is error?

Mr. Knupp: I contend, if the court please, that the instruction with respect to the fact that the court had ordered the defendant to produce Mr. Hughes in the court room is prejudicial. And, also, the fact that the court had instructed the jury that it was entitled to draw an inference from his failure to appear that his testimony would be adverse.

The Court: I think that was a very reasonable penalty, and I think the instruction is proper. Objection overruled.

And your other objections are overruled.

Mr. Gang?

Mr. Gang: I will save the time of the court by merely asking that the objections made in chambers this morning be deemed to have been made at this time.

The Court: They may be.

Mr. Knupp: That is the force of what I understand to be the objections that we are both of us now making.

The Court: That's right. [706]

They will be overruled.

(Whereupon the proceedings were resumed in open court within the hearing of the jury as follows:)

The Court: Mr. Clerk, swear the bailiff.

(Whereupon the bailiff was sworn by the clerk.)

The Court: The jury may retire.

If the jury desires the exhibits, you may send down for them and they will be sent up.

(Whereupon the jury retired from the court room and the following proceedings were had in the absence of the jury:)

The Court: The record will show that the jury has withdrawn.

May the clerk in or out of court swear the other matron when she shows up to assist with the jury?

Mr. Gang: So stipulated.

Mr. Knupp: Oh, yes, if the court please.

The Court: I take it it is stipulated that if the jury wants the exhibits that they may be sent up to the jury?

Mr. Gang: So stipulated.

Mr. Knupp: So stipulated.

The Court: Will counsel go over them with the clerk so that there will be no dispute as to what are the exhibits?

Mr. Gang: There isn't any dispute, as far as I am concerned. [707]

The Court: Were there any, Mr. Clerk, that were marked for identification?

The Clerk: Yes.

Mr. Gang: Yes, on that offer of proof. They should be withdrawn from the jury.

The Court: What I want you both to do is to go over them with the clerk and lay aside the exhibits that may go up to the jury, so that if they are sent for and go up to the jury room there will be no dispute but what the ones that are properly in evidence were sent up to the jury room.

Anything further?

Mr. Knupp: Nothing, if the court please.

The Court: Counsel, I suppose, will share equally the cost of feeding this jury of 12 people?

Mr. Knupp: Is there any way of getting any information in advance of how much they will eat?

The Court: All I can say is it is a \$50,000 case, and their bill will be high.

Mr. Knupp: I don't know. If they order steaks it will exhaust most of it.

Yes, if the court please, counsel I think will stipulate to that effect.

The Court: Counsel need not remain in attendance as long as we can reach you within cab time from your office.

Of course, your office is a little further [708] away.

Mr. Gang: With the freeway we are just as close as Mr. Knupp. Fifteen minutes.

Mr. Knupp: That is the way Mr. Gang drives. The way I drive it would take half an hour.

The Court: I guess it is satisfactory to send the

jury to lunch whenever they want to go, to leave it up to them?

Mr. Gang: Yes.

The Court: Anything further?

Mr. Knupp: Nothing, if the court please.

(Whereupon a recess was taken until 2:45 o'clock p.m., when the following proceedings were had in the absence of the jury:)

The Court: The record will show that in the Sheridan case counsel are present and the jury is absent.

I have a note from the jury reading as follows:
I will file it with the clerk.

“Your Honor: We would like to have you further read to the jury that part of your charge relating to verdict or verdicts we are to sign.

“/s/ THEODORE C. HINCKLEY,
“Foreman.”

There were four verdicts handed to them, which were in sets of two. One was a verdict on the plaintiff's complaint.

By the way, do you want to proceed without Mr. Knupp? [709]

Mr. Jeffers: Yes, your Honor.

The Court: One was a verdict on the complaint; a verdict for the plaintiff and a verdict for the defendant. Then the other two verdicts were on the counter-claim; a verdict for the defendant, and a verdict for the plaintiff. Obviously they should be

told that they are in sets of two, and if they arrive at one verdict on the complaint they need not sign the other verdict on the complaint; and if they arrive at one verdict on the counter-claim, they need not arrive at the other verdict on the counter-claim.

The only other question in my mind is this: If they arrive at a verdict for the plaintiff on the complaint, does that or does that not dispose of the counter-claim?

Mr. Gang: Certainly it does, your Honor. If they find for the plaintiff on the complaint, then they must necessarily find against the defendant on the counter-claim.

The Court: Is that your view?

Mr. Jeffers: I would like just a moment to think that over. I would like Mr. Gang to express his opinions a little further on that.

Mr. Gang: Yes. In order for the jury to find for the plaintiff, they must find she performed the contract and the defendant breached it. If the defendant breached the contract, they are not entitled to recover on the counter-claim.

The Court: That's logical. I think one of Mr. Knupp's [710] instructions, as a matter of fact, had that in it.

Furthermore, a counter-claim is something that diminishes or defeats plaintiff's recovery. If they find for the plaintiff, that means that the defendant broke the contract, therefore if the defendant broke the contract any damage that defendant suffered flowed from his own breach.

Therefore I will advise the jury that as to these

two verdicts, that they are in sets of two, but that if they reach a verdict for the plaintiff on the complaint, that disposes of their work.

Do we have them bring in a verdict, then, for the plaintiff on the counter-claim?

Mr. Gang: I think they must. That follows.

The Court: If they reach a verdict for the defendant on the complaint, then they must still consider the two verdicts on the counter-claim. All right. Bring the jury down.

(Whereupon the proceedings were resumed within the presence of the jury as follows:)

The Court: Let the record show that the jury are present and in their places.

Mr. Gang: So stipulated.

Mr. Jeffers: So stipulated.

The Court: I have the note which the foreman of the jury sent to the court requesting further instructions or [711] rereading of the instructions concerning the verdict, what verdict you should sign.

It may be that I didn't instruct you as fully as I should have in that respect.

The blank verdicts that were given you were in two sets. There was one set on the complaint, and there was another set on the counter-claim. Now, first as to the set on the complaint. If you find for the plaintiff on the complaint, you don't need to sign the other member of that set as to the defendant, because the signing of one eliminates the other on the complaint.

The next point is this: This is an action for

breach of a contract by the plaintiff, plaintiff sues for breach of contract. If you find for the plaintiff on the complaint and decide to sign the verdict for the plaintiff on the suit on the complaint, that means you have found that the defendant breached the contract, and that is the end of the case as far as the counter-claim is concerned, because if the defendant broke the contract then any damage that the defendant claims to have suffered flowed from his own breach and not a breach by the plaintiff. If, on the other hand, you find, in your consideration of the complaint, that the defendant is entitled to a verdict, namely, that the defendant did not break the contract, then you must go to the counter-claim and render a verdict one way or the other on [712] the two verdicts that comprise the set on the counter-claim.

Do I make myself clear on this?

Foreman of the Jury: In so far as the foreman is concerned, you have, your Honor. It is just a question if the jurors understand it.

The Court: Let me go further.

If your verdict is for the plaintiff on the issues of the complaint, then the court will instruct you that there is no way in which the defendant could recover on the counter-claim. So to clean the record up in proper shape you should in that instance sign the verdict, one of the two verdicts on the counter-claim, in favor of Miss Sheridan, which would dispose of the whole matter.

On the other hand, if your verdict on the complaint is for the defendant, then you must go to the

counter-claim and must pass upon the issues raised by the counter-claim and must sign one or the other of the verdicts as you see fit.

If you should find for the defendant on the complaint, that does not determine which way you decide on the counter-claim, because the counter-claim then becomes a sort of a separate law suit which you must decide.

Do I make myself clear on that?

If you find for the defendant on the complaint, all you have found is that the defendant did not break the contract, [713] and you then go to the counter-claim and see whether or not the defendant is entitled to recover on his counter-claim. But if, on the other hand, you find for the plaintiff on the complaint and bring in a verdict for her, then you have found that the defendant broke the contract, and then by that very finding you have determined that the defendant cannot recover on his counter-claim, and so find.

Is that statement clear to counsel?

Mr. Gang: Yes, your Honor.

Mr. Jeffers: Yes, your Honor.

The Court: No objection to that?

Mr. Gang: None.

Mr. Jeffers: None.

The Court: Does that answer your question?

Foreman of the Jury: That answers it.

The Court: The jury may retire.

(Whereupon the jury retired from the court room and the following proceedings were had in the absence of the jury:)

The Court: The record will show the notes from the jury, one sending for the exhibits, and the other asking for instructions.

(Whereupon court was recessed until the return of the jury, when the following proceedings were had:)

The Court: The record will show that the jury are present [714] and in their proper places, and counsel are present in court.

Mr. Gang: So stipulated.

Mr. Jeffers: So stipulated.

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Jury: We have.

The Court: Hand the verdict to the bailiff.

(Verdict passed to the court.)

The Court: Read the verdict, Mr. Clerk.

The Clerk: Title of the court and cause.

“Verdict on the Complaint

“We, the jury in the above-entitled cause, find in favor of the plaintiff, Ann Sheridan, and against the defendant, RKO Radio Pictures, Inc., a Delaware corporation, on the complaint herein, and assess the damages against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00) principal, together with interest in the sum of Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$5,162.42), making a total of Fifty-Five

Thousand One Hundred and Sixty-Two Dollars and Forty-Two cents (\$55,162.42). [715]

“Dated: Los Angeles, California, February 6th, 1951.

“THEODORE C. HINCKLEY,
“Foreman of the Jury.”

Is the verdict which I have just read the verdict of each one of you ladies and gentlemen?

(Assent.)

The Court: Do either counsel care to poll the jury?

Mr. Jeffers: No, your Honor.

The Court: Before the jury is discharged, there has been no verdict returned on the counter-claim. Is there any necessity to ask the jury to go back, in view of the court's statement to them?

Mr. Gang: I don't believe so, your Honor. I think it follows as a matter of law that the judgment on the counter-claim must be against the defendant.

Mr. Jeffers: The defendant is perfectly satisfied, your Honor.

The Court: I think that counsel is correct, that the verdict on the complaint is sufficient and there is no need to ask the jury to return a verdict on the counter-claim, for the reason that by their finding of the verdict on the complaint they have found that the defendant breached the contract; therefore, as a matter of law, any damage the defendant claims to have suffered under its allegations [716] of the counter-claim was caused by its conduct and

not the conduct of plaintiff. In view of counsel's statement representing the defendant that he does not desire the jury to be asked to return to consider the matter of a verdict on the counter-claim, I will let the matter stand on the verdict that has been returned.

The clerk will record the verdict.

The Clerk: In that event wouldn't you have to order a judgment on the counter-claim? [717]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of April, A.D. 1951.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed March 4, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 150, inclusive, contain the original Amended Complaint for Damages for Breach of Contract; Motion to Dismiss and Motion to Strike; Answer and Counterclaim; Answer to Counterclaim; Order for Pre-trial Hearing, etc.; Memorandum for Counsel; Memorandum to Counsel re Pre-Trial Order; Pre-Trial Stipulation and Order of the Court; Plaintiff's Requested Instructions; Jury Instructions Requested by Defendant; Affidavit of Vito Rotunno; Subpoena to Howard Hughes and Return Thereon; Plaintiff's Requested Additional Instructions; Plaintiff's Revised and Additional Instructions Dated 2-4-51; Verdict on the Complaint; Judgment; Defendant's and Plaintiff's Notices of Appeal; Stipulation Designating Record on Appeal and Order Extending Time for Filing the Record and Docketing Appeal and a full, true and correct copy of minute order entered February 21, 1950, which, together with original plaintiff's Exhibits 1 to 22, inclusive; original defendant's exhibits A to E, inclusive, and original reporter's transcripts of proceedings on December 4 and 21, 1950; January 11, 29, 30 and 31, 1951; February 1, 2, 5 and 6, 1951, transmitted herewith, constitute the record on the appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.40, one-half of which has been paid by each of the parties.

Witness my hand and the seal of said District Court this 10th day of May, A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12927. United States Court of Appeals for the Ninth Circuit. RKO Radio Pictures, Inc., a Corporation, Appellant, vs. Ann Sheridan, Appellee, and Ann Sheridan, Appellant, vs. RKO Radio Pictures, Inc., a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed May 14, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12927

ANN SHERIDAN,

Appellant and Appellee,

vs.

RKO RADIO PICTURES, INC.,

Appellant and Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RKO RADIO PICTURES,
INC., INTENDS TO RELY ON APPEAL

Appellant, RKO Radio Pictures, Inc., on its appeal from the judgment entered in the above-entitled action, intends to rely on the following points:

1. The court erred in giving the following instructions to the jury: Each of the Instructions designated in the record as Court's Instructions A, B G, H-1, J-1, L, P, and V for the reasons set forth in the objections of appellant, RKO Radio Pictures, Inc., to said instructions, and in overruling the objections of said appellant to said instructions.

2. The court erred in giving plaintiff's instruction 10 as modified by the court, upon the ground that said instruction embodies an erroneous statement of law.

3. The court erred in refusing to give the instructions No. 1, 2, 5, 6, 7, and 8 tendered by the appellant, RKO Radio Pictures, Inc., for the reasons set forth in appellant's objections to the refusal to give said instructions as set forth in the record.

4. The court erred in instructing the jury, as a fact, that Robert Young was approved by the plaintiff as the person who would portray the leading male role in the film play "Carriage Entrance" and that such instruction is contrary to the fact and said plaintiff never approved any actor who would portray the leading male role in said film play.

5. The court erred in instructing the jury, as a fact, that the approval by plaintiff of Robert Young on April 29, 1949, as the actor who would portray the leading male role in the picture obligated plaintiff to render her services under the contract.

6. The court erred in instructing the jury that the approval on April 29, 1949, by plaintiff of Robert Young as the actor to portray the leading male role in the film play was an approval by plaintiff of the actor who would portray the leading male role in the film play under the terms of the contract of April 29, 1949 (Plaintiff's Exhibit 1), and that plaintiff thereby became bound to render services under the contract.

7. The court erred in instructing the jury that the sole issue to be decided by the jury was, did the plaintiff render any services pursuant to the contract and prior to termination on August 17, 1949, and in instructing the jury, if its answer to such question was in the affirmative, that the jury must render a verdict for plaintiff.

8. The court erred in instructing the jury that if the jury determined that plaintiff rendered any

services pursuant to the contract and prior to termination on August 17, 1949, it need not consider other issues in the case.

9. The court erred in refusing to instruct the jury as requested by defendant that plaintiff prior to the termination of her employment on August 17, 1949, had failed to approve any actor who would portray the leading male role in the film play.

10. The court erred in refusing to instruct the jury as requested by the defendant that the approval by plaintiff on April 29, 1949, of Robert Young to portray the leading male role in the film play did not obligate plaintiff to render her services pursuant to the contract, and the refusal of Young to portray the role made it necessary that defendant should propose and plaintiff should approve some other person before plaintiff became obligated to render her services pursuant to the contract.

11. The court erred in refusing to instruct the jury, as requested by the defendant, that if defendant did in good faith, and after Robert Young refused to portray the role, propose the name of another person to portray such role and the plaintiff refused to approve such person, the defendant was entitled to terminate the contract without payment of any compensation to plaintiff.

12. The court erred in refusing to instruct the jury, as requested by the defendant, that if, after Robert Young refused to portray the leading role in the film play, the defendant did in good faith

propose another person to portray and the plaintiff did not approve such person, the plaintiff never became obligated to render any services pursuant to the contract.

Respectfully submitted,

MITCHELL, SILBERBERG &

KNUPP, and

GUY KNUPP,

By /s/ GUY KNUPP,

Attorneys for Appellant and Appellee RKO Radio
Pictures, Inc.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 14, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT ANN SHERIDAN INTENDS
TO RELY ON APPEAL

Appellant Ann Sheridan on her appeal from the judgment entered in the above-entitled action, intends to rely on the following points:

1. The trial court erred in holding and declaring that the first sentence of Paragraph 29 of the contract which is plaintiff's Exhibit 1 in evidence (reading as follows):

“Producer shall not be required to use Artist's services hereunder or to complete the production of “Carriage Entrance,” and shall be deemed to

have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder.”

became operative thereby limiting appellant Ann Sheridan's recovery to the sum of \$50,000.00.

2. The trial court erred in failing and refusing to permit appellant Ann Sheridan to introduce parol evidence as to the meaning of the phrase “minimum compensation” in the first sentence of Paragraph 29 of said contract if said first sentence was operative.

3. The trial court erred in failing and refusing to permit appellant Ann Sheridan to offer evidence as to the damages suffered by said appellant as a result of the breach of contract by appellee RKO Radio Pictures, Inc., over and above the sum of \$50,000.00.

4. The trial court erred in failing and refusing to give to the jury appellant Ann Sheridan's requested instructions No. 6, No. 6 (alternate) and No. 6 (second alternate), all dealing with the measure of damages.

5. The trial court erred in interpreting the contract between the parties (which contract is plaintiff's Exhibit 1 in evidence) so as to limit the damages awarded to appellant Ann Sheridan for appellee RKO Radio Pictures, Inc., breach of said contract to the sum of \$50,000.00.

6. The trial court erred in failing and refusing to permit the jury to render a verdict in favor of appellant Ann Sheridan and against appellee RKO

Radio Pictures, Inc., for said appellee's breach of contract, in a sum in excess of \$50,000.00.

Respectfully submitted,

GANG, KOPP & TYRE, and
MARTIN GANG,

By /s/ MARTIN GANG,
Attorneys for Appellant and Appellee Ann Sheridan.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 14, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION DESIGNATING PORTIONS
OF RECORD TO BE PRINTED

Appellant and appellee, Ann Sheridan, and appellant and appellee, RKO Radio Pictures, Inc., hereby stipulate and agree that the following portions of the record are material and necessary for the consideration of the points upon which the parties intend to rely upon appeal and that such portions of the record and no other shall be printed:

Clerk's Transcript of Record

(References are to pages of said transcript)

1. Amended complaint. P. 2 to 13 incl.
2. Answer and counterclaim—omitting Exhibit "A" which is identical with plaintiff's Exhibit "1." in evidence. P. 27 to 38, incl.
3. Answer to counterclaim. P. 55 to 57, incl.

4. Memorandum for counsel filed December 13, 1950. P. 60 to 64.

5. Memorandum for counsel on pre-trial order filed January 18, 1951. P. 65 to 67, incl.

6. Pre-trial stipulation and order dated January 30, 1951. P. 68 to 75, incl.

7. Instructions to the jury requested by plaintiff. No. 6, p. 85 to 86. No. 6 alternate, p. 87 to 89. No. 6 second alternate, p. 90 to 91.

8. Instructions to the jury requested by defendant. P. 98 to 110.

9. Affidavit of Vito Rotunno. P. 111 to 117.

10. Return of service of U. S. Marshal. P. 119.

11. Verdict of the jury. P. 141.

12. The Judgment. P. 142 to 143.

13. Notice of appeal filed by plaintiff. P. 145.

14. Notice of appeal filed by defendant. P. 144.

15. Stipulation of the parties designating record on appeal. P. 147 to 149.

16. Order of April 3, 1951, extending time to file record and docket appeal. P. 150.

Reporter's Transcript of Record

The following portions of the reporter's transcript of proceedings:

P. 2, lines 3 to 7, incl.

P. 5, line 16, to p. 6, line 3.

After line 3, p. 6, insert the following:

"Therupon counsel for the rspective parties made opening statements to the jury and upon the conclusion thereof the following proceedings were had":

P. 28, line 1 to p. 277, line 4, incl.

P. 285, line 1, to p. 527, line 14, incl.

P. 538, line 1, to p. 596, line 6.

After p. 596, line 6, insert the following:

“Counsel met with the court in chambers in the absence of the jury for the purpose of considering the instructions of the court to the jury. Instructions tendered by the plaintiff and instructions tendered by the court were read and arguments of the parties with respect to such instructions heard by the court and considered. At the conclusion of such hearing the court announced that it would give none of the instructions tendered by the plaintiff except that plaintiff’s requested instruction No. 10 would be given as modified by the court and that the court would give none of the instructions requested by defendant except that it would give instruction No. 4 requested by defendant. The court stated to counsel that the court had prepared its own instructions to the jury and delivered said instructions to counsel. Each of such instructions to which objections were made or exceptions taken is identified by the letter set forth in the reporter’s transcript of proceedings. The court’s instructions were considered and the arguments of counsel with respect thereto heard and considered and the court requested counsel to make any objections or take any exceptions which counsel had to the court’s instructions or to the refusal of the court to give the instructions requested by the parties.”

Here insert in the printed record the following

from the reporter's transcript of the proceedings.

P. 669, line 1, to p. 717, line 10.

Exhibits

In order to reduce the size of the printed record and minimize the cost thereof, and due to the fact that the following exhibits are lengthy and only relatively short portions thereof are material to consideration of the points upon which the parties intend to rely upon this appeal, none of the following exhibits shall be printed in the record and each party may print in an appendix to his brief such excerpts or portions thereof as he deems material to any point upon which he relies.

Plaintiff's Exhibit 1.

Plaintiff's Exhibit 3 for Identification.

Plaintiff's Exhibit 4 for Identification.

Plaintiff's Exhibit 5 for Identification.

Plaintiff's Exhibit 11.

Plaintiff's Exhibits 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.

Defendant's Exhibits D, E.

The following exhibits were read to the jury and are set out in the portion of the record designated to be printed and need not be printed separately:

Plaintiff's Exhibits 2, 6, 7, 8, 9, 10.

Defendant's Exhibits A, B, C.

GANG, KOPP & TYRE, and
MARTIN GANG,

By /s/ MARTIN GANG,

Attorneys for Appellant and Appellee Ann Sheridan.

MITCHELL, SILBERBERG &
KNUPP, and
GUY KNUPP,

By /s/ GUY KNUPP,

Attorneys for Appellant and Appellee RKO Radio
Pictures, Inc.

[Endorsed]: Filed May 14, 1951.

[Title of Court of Appeals and Cause.]

ORDER RE PRINTING OF EXHIBITS IN
RECORD ON APPEAL

It appearing to the court from the stipulation of the parties filed herein that the following exhibits received upon the trial of the case, to wit: Plaintiff's Exhibits 1, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, and defendant's Exhibits D and E, are lengthy and that only short portions thereof are or may be material to a consideration of the points intended to be relied upon on this appeal,

It Is Ordered that said exhibits need not be printed as part of the printed record and that either party shall be entitled to print in an appendix to his brief such portions of either or any of said exhibits as such party may consider material to any point relied upon by him.

It further appearing to the court from said stipulation that each of the following exhibits received upon the trial of said case, to wit: Plaintiff's Exhibits 2, 6, 7, 8, 9 and 10, and defendant's Exhibits A, B and C, were read to the jury and appear in

full in the portion of the Reporter's Transcript of Proceedings designated to be included in the printed record;

It Is Further Ordered that none of said Exhibits shall be printed separately from the copy thereof set forth in said printed record.

Dated: May 15, 1951.

/s/ WILLIAM HEALY,

/s/ WM. E. ORR,

/s/ WALTER L. POPE,

Judges U.S. Court of Appeals
for the Ninth Circuit.

[Endorsed]. Filed May 23, 1951.